Supreme Court, U.S.
FILED

01 178 JUN 30 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Petitioner,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

BERNAYS T. BARCLAY
KING & SPALDING
1185 Avenue of the Americas
New York, NY 10036
(212) 556-2100

GRIFFIN B. BELL
KEVIN R. SULLIVAN
Counsel of Record
JEFFREY S. BUCHOLTZ
KING & SPALDING
1730 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 737-0500

Attorneys for Petitioner

July 30, 2001

66 pp

QUESTION PRESENTED

Whether a state-regulated private utility enjoys state-action immunity from antitrust liability for its monopolization of an unregulated market by means of non-price anti-competitive conduct neither approved nor supervised by the State.

LIST OF PARTIES

The caption of this case contains the names of all the parties to the proceedings in the courts below. Petitioner Trigen-Oklahoma City Energy Corporation ("Trigen") was the plaintiff in the district court and the appellee/cross-appellant in the court of appeals. Respondent Oklahoma Gas & Electric Company ("OG&E") was the defendant in the district court and the appellant/cross-appellee in the court of appeals.

LIST PURSUANT TO RULE 29.6

Petitioner Trigen, a Delaware corporation, is a direct wholly-owned subsidiary of Trigen-Oklahoma Energy Corporation, a Delaware corporation. Trigen-Oklahoma Energy Corporation is not publicly-held; it is a direct wholly-owned subsidiary of Trigen Energy Corporation, a Delaware corporation. Accordingly, no publicly-held company owns 10% or more of Trigen's stock. Trigen Energy Corporation, in turn, is a direct wholly-owned subsidiary of ELYO, a French corporation. ELYO is a direct wholly-owned subsidiary of Tractebel, a Belgian corporation. Tractebel is a direct wholly-owned subsidiary of Suez, a publicly-held French corporation.

TABLE OF CONTENTS

Page:

QUESTION PRESENTED i

LIST OF PARTIES ii

LIST PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 6

I. THE TENTH CIRCUIT'S EXPANSION OF STATE-ACTION IMMUNITY WILL FRUSTRATE THE STATES' ABILITY TO FASHION FLEXIBLE AND APPROPRIATE RESPONSES TO INCREASED COMPETITIVE ACTIVITY BY TRADITIONALLY REGULATED COMPANIES 7

II. THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENTS BY ADOPTING A STATUS-BASED VIEW OF IMMUNITY THAT IGNORED THE ANTI-COMPETITIVE CONDUCT AT ISSUE 12

CONCLUSION 22

TABLE OF AUTHORITIES

Cases: Page

A.D. Bedell Wholesale Co. v. Philip Morris, Inc., ___ F.3d ____, 2001 WL 708447 (3d Cir. June 19, 2001) 18

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 2

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ..... *passim*

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) ..... *passim*

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) 13

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 7, 14

Community Commun. Co. v. City of Boulder, 455 U.S. 40 (1982) 16

Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) 14

Cost Management Servs., Inc. v. Washington Natural Gas Co., 99 F.3d 937 (9th Cir. 1996) 17

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992) 19

FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) ..... *passim*

Hicks v. Feiock, 485 U.S. 624 (1988) 22

Kingwood Oil Co. v. Hall-Jones Oil Corp., 396 P.2d 510 (Okla. 1964) 21

Leck v. Continental Oil Co., 800 P.2d 224 (Okla. 1989) 22

MM Res., Inc. v. Huston, 710 P.2d 763 (Okla. 1985) 21

Ohio v. Reiner, 121 S. Ct. 1252 (2001) 22

Parker v. Brown, 317 U.S. 341 (1943) 5

Patrick v. Burget, 486 U.S. 94 (1988) ..... *passim*

Snake River Valley Elec. Ass'n v. PacifiCorp, 238 F.3d 1189 (9th Cir. 2001) 18

Southern Motor Carriers Rate Conference, Inc.. v. United States, 471 U.S. 48 (1985) 16

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 8

Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138 (1984) 22

United States v. Continental Can Co., 378 U.S. 441 (1964) 19

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) 19

United States v. Grinnell Corp., 384 U.S. 563 (1966) 21

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) 2

Constitutional Provisions, Statutes, and Rules:

15 U.S.C. § 2 ..... 1, 4, 5

15 U.S.C. § 15 1

28 U.S.C. § 1254 1

28 U.S.C. § 1331 4

28 U.S.C. § 1337 4

28 U.S.C. § 1367 4

Fed. R. Civ. P. 50 ..... 4, 19

Fed. R. Civ. P. 59 4

Okla. Const. art. IX, § 18 1

Okla. Const. art. IX, § 19 1

Okla. Const. art. IX, § 20 1

Okla. Const. art. IX, § 24 1

Colo. Rev. Stat. § 40-8.5-103 10

4 Colo. Code Regs. § 723 10

Kan. Stat. Ann. § 66-101 10

Kan. Stat. Ann. § 66-104 10

Kan. Stat. Ann. § 66-1188 10

Kan. Stat. Ann. § 66-1201 10

Kan. Stat. Ann. § 66-1231 10

N.M. Stat. Ann. § 62-3-3 10

N.M. Stat. Ann. § 63-9A-3 10

17 Okla. Stat. § 151 10

17 Okla. Stat. § 152 1

17 Okla. Stat. § 190.4 (1997) 9

20 Okla. Stat. § 1601 22

79 Okla. Stat. § 1 4

79 Okla. Stat. § 4 4

2001 Okla. Sess. Laws 397, § 4 (June 9, 2001) 9

Utah Code § 54-2-1 10

Utah Code § 54-8b-2 10

Wyo. Stat. § 37-1-101 10

Other Authorities:

R. Bolze, J. Peirce & L. Walsh, *Antitrust Law Regulation: A New Focus for a Competitive Energy Industry,* 21 Energy L. J. 79 (2000) 8, 9, 10

R. Bork, *The Antitrust Paradox* 2

National Ass'n of Regulatory Utility Comm'rs, *Codes of Conduct Governing Competitive Market Developments In the Energy Industry: An Analysis of Regulatory Actions* (Nov. 2000) (http://www.naruc.org/Resolutions/2000_conv/codes_of_conduct_white_paper.htm) 9

Petitioner respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 244 F.3d 1220 and is reproduced at App. 1a-15a, *infra*. The order of the court of appeals denying rehearing and rehearing *en banc* is unreported and is reproduced at App. 23a. The amended judgment entered by the district court and reversed by the court of appeals is unreported and is reproduced at App. 16a. The order of the district court on the parties' post-trial motions is unreported and is reproduced at App. 18a.

JURISDICTION

The court of appeals entered its judgment on April 3, 2001, and entered its order denying rehearing and rehearing *en banc* on May 1, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of 15 U.S.C. §§ 2 & 15; Okla. Const. art. IX, §§ 18, 19, 20 & 24; and 17 Okla. Stat. § 152 are reproduced at App. 25a-32a.

STATEMENT

Trigen brought this antitrust suit challenging the non-price anti-competitive conduct that OG&E employed (as the jury found) to monopolize the market for cooling services in downtown Oklahoma City, in violation of § 2 of the Sherman Act. OG&E's challenged conduct, which included

misrepresentations, interference with contract, improper payments, and other exclusionary conduct not related to OG&E's rates, was neither authorized by a state law nor supervised by a state agency. Nonetheless, the Tenth Circuit held that because of OG&E's status "[a]s a state-regulated electric utility, OG&E has clearly met the two-prong test for state action immunity." App. 9a. Trigen seeks review of the court of appeals' expansion of the state-action immunity doctrine in direct and substantial conflict with this Court's precedents.

1. *OG&E's Anti-Competitive Conduct.* Trigen is in the business of providing cooling services to commercial and government buildings in downtown Oklahoma City. Trigen provides cooling services by chilling water at a large, centrally-located facility and circulating the chilled water to customers' air-conditioning units through a network of pipes. Because a building that uses Trigen for cooling services does not need to install its own electricity-powered air-conditioning plant, Trigen's initial success in obtaining long-term cooling services contracts (20 years or longer) alarmed OG&E, the privately-owned utility that enjoys the State's exclusive franchise to provide electric service in Oklahoma City until deregulation is implemented.

OG&E therefore put into effect a comprehensive predatory scheme that it labeled a "Plan of Action" to "remove customers from Trigen" and to deny Trigen any new cooling services customers. OG&E's Plan notably did not involve competing on the merits, *i.e.*, by lowering its prices or improving its services.[1] To the contrary, as the jury

---

[1] *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.") (quoting R. Bork, *The Antitrust Paradox* 138); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) (per curiam) (stating that "competition on the merits . . . involves, for example, greater efficiency or enhanced consumer appeal").

found, OG&E succeeded in monopolizing the relevant market for cooling services by means of non-price anti-competitive conduct.[2]

The jury heard evidence of extensive and varied non-price predatory conduct in furtherance of OG&E's Plan. Among other things, OG&E targeted Trigen's existing and potential customers and falsely disparaged Trigen's rates and services; OG&E misrepresented the potential benefits of its own cooling-services proposals, which included monetary grants and financing and construction packages; OG&E disregarded its counsel's advice not to "help" Trigen customers "break" their contracts; OG&E provided special financial "thermal storage grants" and other benefits to Trigen's customers that had no business purpose other than to exclude Trigen from the cooling-services market; OG&E employed consultants solely for their ability to target Trigen's customers; and OG&E treated Trigen's existing and prospective customers to meals, drinks, golf, flights on its corporate jet, and out-of-town junkets. In addition, characterizing its payments as "Trigen competition," OG&E hired the son of the Oklahoma County commissioner whose vote OG&E needed to prevent the County from extending its contract with Trigen and paid the son's shell company $138,000 for no apparent work.

The Oklahoma Corporation Commission ("OCC") never approved, or even considered, any of this non-price anti-competitive conduct. OG&E has never contended otherwise. In fact, the only involvement of the OCC in any facet of OG&E's conduct at issue in this case was its approval of a so-called "real-time pricing" (or "RTP") electric rate tariff. Rather than specify a particular rate for a customer's use of

---

[2] Extensive evidence demonstrated that the relevant market was the market for cooling services to commercial and government buildings in downtown Oklahoma City, and the jury so found. 10th Cir. App. vol. III at 476 (charge). OG&E did not present any evidence to support an alternative definition of the relevant market.

electricity, this tariff contained formulae for flexible day-ahead and week-ahead pricing, which could be useful to certain customers able to shift their usage of electricity to non-peak times. Even before the OCC approved this tariff, OG&E offered it to Oklahoma City for the Myriad convention center, and misrepresented that it would result in an average electricity cost of 1.8 cents per kilowatt hour, with full knowledge that the Myriad would be unable to achieve such a low cost. The OCC had no role in OG&E's Myriad offer and never approved, or even considered, this misrepresentation.[3]

2. *The Jury's Verdict.* After hearing all the evidence, the jury found (*inter alia*) that OG&E had monopolized "the market for cooling services to commercial and government buildings in downtown Oklahoma City." 10th Cir. App. vol. III at 476 (charge).[4] The jury found that Trigen had been damaged thereby and awarded damages, which the district court trebled and adjusted to avoid duplication. After denying OG&E's motion for judgment as a matter of law or a new trial under Fed. R. Civ. P. 50(b) and 59, App. 18a-22a, the district court entered judgment for $20,641,548, all but $179,226 of which represented damages that Trigen suffered

---

[3] At no time did Trigen ever contend that the RTP tariff itself was predatory. Far from contending that the formulae in this tariff would result in rates that were "too low," Trigen's complaint was precisely the opposite: that because this tariff in reality would result in cooling-services costs for the Myriad that were *higher* than Trigen's cooling-services costs, OG&E could not compete on the basis of price and consequently resorted to *non-price* predation as described in the text.

[4] The jury also found that OG&E had restrained trade and discriminated in violation of 79 Okla. Stat. §§ 1 & 4 and had engaged in tortious interference with contract and with prospective economic advantage in violation of the common law of Oklahoma. App. 2a. Having found actual monopolization, the jury did not reach Trigen's claim of attempted monopolization in violation of § 2 of the Sherman Act. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337 & 1367.

in its business or property as a result of OG&E's violation of § 2 of the Sherman Act. App. 16a-17a.

3. *The Court of Appeals' Decision.* OG&E argued on appeal that Trigen's antitrust claims were entirely barred under the state-action immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny.[5] This Court has made clear that a State's immunity does not extend to anti-competitive conduct by a private party such as OG&E "unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by [the] private actor[ ]." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

The Tenth Circuit, however, adopted an expansive view of the state-action immunity doctrine that bears no resemblance to the narrow doctrine recognized by this Court. *First*, rather than analyze whether Oklahoma clearly authorized or actively supervised "the particular anticompetitive conduct at issue," *id.* at 634, the court below did not look past OG&E's status as a regulated utility. "As a state-regulated electric utility," the court held, "OG&E has clearly met the two-prong test for state action immunity." App. 9a.

Second, rather than require OG&E to carry the "rigorous" burden of demonstrating that its challenged conduct was authorized and actively supervised by the State, *Patrick v. Burget*, 486 U.S. 94, 100 (1988), the court inverted the analysis. Proceeding from the premise that OG&E enjoyed blanket immunity, the Tenth Circuit imposed on *Trigen* the burden of demonstrating that OG&E's

---

[5] At trial, by contrast, OG&E took the much narrower position that state-action immunity "reach[es] only one thing in this case, Your Honor, the RTP rate." 10th Cir. App. vol. XI at 3031. The court below declined to hold OG&E to this position. *See* App. 7a-8a.

challenged conduct "somehow destroy[ed]" that immunity. App. 11a.

Third, the Tenth Circuit sought to distinguish this Court's holding in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 (1976), that even a regulated utility must "comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." The evidence established beyond any doubt that the cooling services market found by the jury was just such a "competitive area[ ] of the economy," and OG&E in fact had conceded that "Trigen and OG&E are direct and substantial competitors in Oklahoma City," OG&E 10th Cir. Br. 9. Nonetheless, the court below found it dispositive that "OG&E is selling only one thing -- electricity at state-regulated rates." App. 11a.

For the court below, in sum, all that mattered was that OG&E's rates for electricity are approved by the OCC. *See* App. 7a (holding that its determination that "all of [OG&E's] regulated electricity sales are [immune] . . ., standing alone, is enough to mandate dismissal of the federal antitrust claims"). So long as OG&E did not "sell" another product, OG&E was immune from liability for any and all anti-competitive conduct, whether or not the challenged conduct concerned OG&E's rates and whether or not the State authorized or supervised the challenged conduct.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether the federal antitrust laws will apply to a broad range of companies in the many States that are attempting to manage the transition to reduced levels of regulatory oversight and increased reliance on competition in the electric power and other traditionally regulated industries. Under the status-based immunity doctrine adopted by the Tenth Circuit, every private company whose basic rates for traditional services are approved by regulators will enjoy a sweeping license to

engage in unauthorized and unsupervised non-price predation. The Tenth Circuit's holding simply ignores this Court's precedents, and if it is allowed to stand at this critical time, it will substantially impair the States' ability to deal effectively with changing conditions in regulated and deregulating industries.

I. THE TENTH CIRCUIT'S EXPANSION OF STATE-ACTION IMMUNITY WILL FRUSTRATE THE STATES' ABILITY TO FASHION FLEXIBLE AND APPROPRIATE RESPONSES TO INCREASED COMPETITIVE ACTIVITY BY TRADITIONALLY REGULATED COMPANIES

The decision below adopted a status-based rule for state-action immunity that, if allowed to stand, would extend the States' immunity to private parties far beyond what this Court's precedents permit. *See infra.* The decision below would transform the state-action immunity doctrine from a sharply limited and "disfavored" exemption from the otherwise-encompassing Sherman Act, *Ticor Title,* 504 U.S. at 636,[6] into a sweeping license permitting utilities whose rates for regulated services are approved to suppress competition with impunity by means of unsupervised non-price predation. This expansion of private-party immunity will allow incumbents to destroy new entrants and deprive consumers of the fruits of competition. As this Court already has recognized, "[t]he national policy in favor of competition" embodied in the antitrust laws is far too important to tolerate such easy evasion. *Midcal,* 445 U.S. at 106; *see also City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398 (1978) ("Congress, exercising the full

---

[6] At least one Member of this Court has questioned whether the States' immunity *ever* extends to private parties. *See id.* at 641 (Scalia, J., concurring) ("I am skeptical about the *Parker v. Brown* exemption for state-programmed private collusion in the first place.") (citation omitted).

extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country.") (footnotes omitted). Under this Court's precedents, any implied antitrust immunity for private parties is narrowly limited. *See also, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986) ("exemptions from the antitrust laws are strictly construed and strongly disfavored").

1. This Court's intervention to correct such a departure from its precedents would be warranted even if the issue involved were of only ordinary significance. The decision below, however, comes at a critical time of transition in the Nation's regulated industries and involves issues of surpassing importance. Many States are addressing demands by regulated utilities in several industries (including electricity, natural gas, and telecommunications) to compete in new, unregulated markets. At the same time, many States are experimenting with or considering introducing competition into traditionally regulated markets. These initiatives require the States to grapple with difficult issues of cross-subsidization, potential abuse of monopoly power, maintenance of service quality and reliability, and consumer welfare. *See* R. Bolze, J. Peirce & L. Walsh, *Antitrust Law Regulation: A New Focus for a Competitive Energy Industry*, 21 Energy L. J. 79, 79 (2000) ("With the deregulation of both the electric and natural gas markets . . . the antitrust laws are rapidly gaining importance."). To meet these new challenges, States are developing and testing new regulatory schemes to supplement or replace regulations that have been in place for a half-century but are too inflexible and cumbersome to protect the public interest in today's rapidly-evolving commercial environment.[7] Whether these

[7] In place of traditional rate-of-return rate regulation, for example, States are experimenting with "codes of conduct," "price-cap" regulation, "performance-based ratemaking," and "real-time pricing," as well as with allowing new "energy service companies" to compete for utilities'

initiatives will be successful, and whether they will benefit consumers, remains to be seen. But the last thing that States need at this critical time is the confusion and frustration that the decision below will generate.

Indeed, this case provides a striking example of the importance of the antitrust laws during a transition to competition in a regulated industry. *Cf.* R. Bolze, et al., *Antitrust Law Regulation,* 21 Energy L. J. at 79 ("Because incumbent utilities may retain significant market power during the initial stages of deregulation, they may be likely targets for antitrust scrutiny."). With better than twice OG&E's efficiency in converting fuel to energy, and with an independent power producer as a parent company, Trigen was a potentially formidable competitor in the Oklahoma City retail electricity market once that market was deregulated. 10th Cir. App. vol. VI at 1182-89. OG&E implemented its Plan of Action to remove customers from Trigen not only because of its desire to monopolize the market for cooling services, but also in order to reduce the impact of this potential competition. *See* 10th Cir. App. vol. IX at 2429-30.[8]

The effects of the decision below will extend far beyond the parties and the industries involved in this case. Even within the States of the Tenth Circuit, dozens of incumbents in a variety of industries -- electric companies, water companies, local telecommunications exchange carriers,

---

customers. *See generally* National Ass'n of Regulatory Utility Comm'rs, *Codes of Conduct Governing Competitive Market Developments in the Energy Industry: An Analysis of Regulatory Actions* (Nov. 2000) (http://www.naruc.org/Resolutions/2000_conv/codes_of_conduct_white_paper.htm).

[8] At the time of trial, retail electricity deregulation was scheduled to be implemented by July 1, 2002. *See* 17 Okla. Stat. § 190.4(B)(3) (1997). Oklahoma recently suspended further formal deregulation pending completion of a report by a special commission. *See* 2001 Okla. Sess. Laws 397, § 4 (June 9, 2001) (to be codified as 17 Okla. Stat. § 190.20).

sewerage companies, gas companies, and pipeline companies -- have their rates for services approved by state regulators.[9] Under the decision below, each of these incumbents, like OG&E, will be free to engage in non-price predation without fear of antitrust liability, even where no regulator actively supervises its anti-competitive conduct.

Affording broad status-based immunity to private parties is antithetical to the States' efforts as well as to the national policy in favor of competition. What is more, it undermines each State's authority to decide for itself how to structure and manage industries that are vital to the health and welfare of its citizens. Among the States and across the many industries affected by the decision below, regulation exists on a spectrum. Especially in the current environment of nascent deregulation, States quite reasonably may choose a middle ground between total command-and-control supervision of an industry's operations and total reliance on the free market and the antitrust laws. *See* R. Bolze, et al., *Antitrust Law Regulation*, 21 Energy L. J. at 81 (predicting that States will "shift away from prescriptive regulation toward 'light-handed' regulation that aims to structure a competitive market"). This Court's decisions recognize as much and respect the States' choices by affording immunity where, but only where, "an anticompetitive act of a private party . . . [is] fairly attributable to the State." *Patrick*, 486 U.S. at 100.

---

[9] *See, e.g.*, Colo. Rev. Stat. § 40-8.5-103 (electric companies); 4 Colo. Code Regs. §§ 723-2-2.34 & 723-5-2 (ILECs and water companies); Kan. Stat. Ann. §§ 66-101, 66-104, 66-1188, 66-1201, & 66-1231 (electric, telecommunications, water, pipeline, and gas companies); N.M. Stat. Ann. § 62-3-3 (electric, water, gas, and sewerage companies); N.M. Stat. Ann. § 63-9A-3 (telecommunications companies) (repealed eff. July 1, 2003); 17 Okla. Stat. § 151(b), (c) & (d) (gas, electric, and water companies); Okla. Corp. Comm'n Rule OAC 165:55-1-4 (ILECs); Utah Code §§ 54-2-1 & 54-8b-2 (electric, gas, sewerage, railroad, telecommunications, and water companies); Wyo. Stat. § 37-1-101 (electric, gas, water, and pipeline companies).

2. The Tenth Circuit's decision interferes with States' rights to choose from a spectrum of regulatory options. This Court's decision in *Ticor Title* teaches that affording a broader immunity to private parties would compromise the States' freedom to choose the types and levels of regulation that they believe appropriate for particular industries. Agreeing with the 36 States that had filed a brief "deny[ing] that respondents' broad immunity rule would serve the States' best interests," the Court explained:

> If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it. . . . *By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.*

504 U.S. at 635-36 (emphasis added).

The decision below is fundamentally inconsistent with this Court's recognition that the States need "regulatory flexibility." *See also id.* at 637. Under the decision below, a State will be in regulation for a pound if it is in for a penny; Oklahoma's approval of OG&E's rates, standing alone, will render OG&E immune for any and all non-price conduct. The Tenth Circuit's decision effectively will prohibit Oklahoma from deciding that a company's rates should be regulated, but that the company in other respects should remain subject to the federal antitrust laws. By preventing Oklahoma from balancing its displacement of the antitrust laws to conform to its actual regulatory objectives vis-à-vis private parties, the decision below leaves Oklahoma for practical purposes with a choice between total regulation (the only condition under which total displacement of the antitrust laws would be tolerable) and no regulation (and total reliance on the antitrust laws).

Such a result ignores this Court's admonition in *Ticor Title* that "[n]either federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *Id.* at 636. No precedent, and no conceivable policy, support forcing such an artificial and undesirable choice upon the States.

II. THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENTS BY ADOPTING A STATUS-BASED VIEW OF IMMUNITY THAT IGNORED THE ANTI-COMPETITIVE CONDUCT AT ISSUE

1. A private party's claim to immunity demands an analysis of its conduct, not its status. Unlike States, private parties -- even regulated companies -- enjoy no blanket immunity from the federal antitrust laws. Under this Court's precedents, immunity attaches to a private party's *actions* that constitute *state action* -- not to private *parties* that may be state-regulated *actors*. To show that its anti-competitive conduct "should be deemed state action and thus shielded from the antitrust laws," a private party must satisfy "a rigorous two-pronged test." *Patrick*, 486 U.S. at 100. First, a private party must show that "the challenged restraint [is] 'one clearly articulated and affirmatively expressed as state policy.' Second, the anticompetitive conduct 'must be actively supervised by the State itself.'" *Id.* (quoting *Midcal*, 445 U.S. at 105; other internal quotation omitted). As this Court explained, "[t]he active supervision requirement stems from the recognition that '[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Id.* (citation omitted).

This Court's cases leave no room for doubt that the analysis of a private party's claim to share the State's

immunity must focus on the State's involvement in the particular private conduct challenged as anti-competitive. *Patrick*, for example, teaches that the "active supervision" requirement

> is designed to ensure that the state-action doctrine will shelter *only the particular anticompetitive acts of private parties* that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control *over the challenged anticompetitive conduct.*

Id. at 100-01 (emphases added).

This Court's decision in *Ticor Title* made it even more clear that a private party enjoys state-action immunity only if the specific private conduct at issue qualifies as state action. The Court explained that both of *Midcal*'s requirements "are directed at ensuring that *particular anticompetitive mechanisms* operate because of a deliberate and intended state policy." 504 U.S. at 636 (emphasis added). *Midcal*'s first prong, which requires "a clear and affirmative policy to allow the anticompetitive conduct," *id.* at 631, "cannot alone ensure, as required by our precedents, that *particular anticompetitive conduct* has been approved by the State." *Id.* at 637 (emphasis added). "In the absence of active supervision in fact," a private party's actions are not immune. *Id.* at 638.[10]

This Court thus has recognized that a private party may enjoy the State's immunity for certain conduct, while remaining subject to liability for other conduct. *See, e.g., City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991); *Cantor*, 428 U.S. at 596. Nothing in

---

[10] *Accord, e.g., Midcal*, 445 U.S. at 106 (holding that because the State did not engage in "pointed reexamination" of the challenged program, the State's involvement constituted only "a gauzy cloak" that could not thwart "[t]he national policy in favor of competition").

any of this Court's decisions remotely suggests that a private party enjoys a blanket free pass for any and all anti-competitive conduct simply because *some* of its conduct is "affirmatively expressed as state policy" and "actively supervised" by the State. In *Cantor*, for example, the Court held that an electric utility was not immune for its conduct in providing free replacement light bulbs, even though the utility had included that practice in an approved tariff filing. Even a regulated utility, this Court emphasized, remains subject to "antitrust standards to the extent that it engages in business activity in competitive areas of the economy," such as the unregulated light-bulb market. 428 U.S. at 596.[11]

2. The Tenth Circuit adopted a presumption of immunity based on status that ignored the anti-competitive conduct at issue. This expanded immunity doctrine cannot be reconciled with this Court's precedents in several respects.

First, and most fundamentally, the Tenth Circuit adopted a status-based view of private-party immunity that rendered irrelevant Oklahoma's involvement (or, more accurately, non-involvement) in the particular conduct that Trigen challenged. The court below recited *Patrick*'s holding that the State must "exercise ultimate control over the challenged anticompetitive conduct." App. 9a (quoting *Patrick*, 486 U.S. at 100-01). But it then proceeded to hold that OG&E's status as a regulated company was dispositive, while ignoring "the challenged anticompetitive conduct" at issue in this case: "As a state-regulated electric utility," the court

---

[11] *See also City of Lafayette*, 435 U.S. at 417 (plurality op.) ("even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization"); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 706 (1962) (no immunity because the "exclusion" at issue "resulted from the action of [a private party] taken within the area of its discretionary powers"); *cf. Ticor Title*, 504 U.S. at 636 (observing that a State "may regulate its public utilities without authorizing monopolization in [an unregulated] market").

held, "OG&E has clearly met the two-prong test for state action immunity." App. 9a.

a. In keeping with this status-based holding, the Tenth Circuit never considered whether Oklahoma actively supervised the anti-competitive conduct challenged by Trigen. The court simply stated that "[t]he OCC . . . actively supervises OG&E, meeting the second part of the test for state action immunity," while noting that "[t]he OCC has 'general supervision' over OG&E." App. 10a. No one disputes that the OCC "supervises OG&E," *id.*, to some extent and in some respects. The relevant question under this Court's precedents, however, is whether "the particular anticompetitive conduct at issue . . . [was] supervised by governmental actors." *Ticor Title*, 504 U.S. at 634.

The Tenth Circuit's reliance on the existence of powers of "general supervision" is foreclosed by *Patrick* and *Ticor Title*. In *Patrick*, this Court held without dissent that Oregon had not actively supervised the anti-competitive termination of hospital privileges there at issue even though a state agency had "general supervisory powers" over hospitals' peer-review procedures. 486 U.S. at 102. Likewise, the Tenth Circuit's observation that the OCC has certain powers over electric utilities, App. 9a-10a, ignores this Court's holding in *Ticor Title* that "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State," and that only "active supervision in fact" can "ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State." 504 U.S. at 637-38; *see also Patrick*, 486 U.S. at 101 ("The mere presence of some state involvement or monitoring does not suffice.").[12]

---

[12] The dissenters in *Ticor Title* argued that the requirement of active supervision of the particular anti-competitive conduct at issue was too strict. *See* 504 U.S. at 641-46 (Rehnquist, C.J., joined by O'Connor, J., and Thomas, J., dissenting); *id.* at 646-47 (O'Connor, J., joined by Thomas, J., dissenting). It bears emphasis that even if this requirement were relaxed so that only *some* of the anti-competitive conduct at issue

b. The Tenth Circuit also did not consider whether Oklahoma had "articulated a clear and affirmative policy to allow the anticompetitive conduct" challenged by Trigen. *Ticor Title*, 504 U.S. at 631. In holding that *Midcal*'s first prong was satisfied because "Oklahoma has clearly articulated a policy to displace competition with the regulation of electric utilities," App. 8a, without considering whether Oklahoma had articulated a policy to allow the anti-competitive conduct at issue, the Tenth Circuit again failed to heed this Court's precedents.

Although OG&E was not required to "'point to a specific, detailed legislative authorization' for its challenged conduct," App. 8a, the Tenth Circuit failed to recognize that the critical question under *Midcal*'s first prong "is whether the [respondent's] challenged conduct was taken pursuant to a clearly articulated state policy." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 62 (1985); *see also Ticor Title*, 504 U.S. at 636 ("Both [of *Midcal*'s elements] are directed at ensuring that *particular anticompetitive mechanisms* operate because of a deliberate and intended state policy") (emphasis added). Oklahoma may have articulated a policy to have electricity rates set under a regulatory scheme rather than by market forces, but none of the Oklahoma constitutional provisions or statutes relied upon by the Tenth Circuit (App. 9a-10a, 26a-32a) articulates any policy to allow the types of non-price anti-competitive conduct at issue here.[13]

---

need have been actively supervised, the Tenth Circuit's reliance on the existence of powers of "general supervision" still would fail. Indeed, because it did not require *any* supervision in fact, the decision below would fail even the undemanding standard adopted by the lower court in *Ticor Title* and expressly rejected by this Court. *See id.* at 637 (holding that the lower court's requirement of "some basic level of activity" is "insufficient to establish the requisite level of active supervision").

[13] *See also, e.g., Community Commun. Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (holding that *Midcal*'s first prong was not satisfied because

Second, the Tenth Circuit turned the proper analysis on its head when it finally addressed OG&E's predatory conduct. In the court of appeals' view, Trigen was contending "that OG&E's alleged 'bad acts' somehow destroy OG&E's state action immunity." App. 11a. The quoted formulation betrays a complete failure to comprehend this Court's precedents. Under this Court's decisions, immunity could attach to OG&E's "bad acts" only if OG&E made the "rigorous" showing that its challenged conduct was clearly authorized and actively supervised by the State. *Patrick*, 486 U.S. at 100.

The Tenth Circuit inverted this analysis and transformed private-party immunity from a "disfavored" and limited doctrine, *Ticor Title*, 504 U.S. at 636, into a seemingly conclusive presumption. Because of its status-based view of the scope of immunity, the Tenth Circuit began from the premise that OG&E, as a state-regulated utility, enjoyed blanket immunity. Instead of considering whether OG&E had shown that the particular anti-competitive acts at issue in this case were immune, the court asked whether Trigen had shown that OG&E's challenged conduct "somehow destroy[ed]" OG&E's immunity. Then, suggesting that the burden it had imposed on Trigen was an impossible one, the court concluded that the particular anti-competitive conduct charged (and proved to the jury's satisfaction) was quite irrelevant: "[E]ven if OG&E had committed these alleged 'bad acts,' its state action immunity would remain intact." App. 11a. For the Tenth Circuit, the fact that OG&E is a regulated company whose rates are approved by the State,

---

the State had not "'contemplated' the specific anticompetitive actions" at issue); *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 942 (9th Cir. 1996) ("the fact that Washington may have displaced competition in the market for sale of natural gas with a regulatory structure is not dispositive. Rather, the relevant question is whether the regulatory structure which has been adopted by the state has specifically authorized the conduct alleged to violate the Sherman Act.").

without more, rendered OG&E an arm of the State itself, entitled to immunity for anything and everything that it might do.[14]

Third, the Tenth Circuit attempted to distinguish this Court's decision in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), but the decision below squarely conflicts with *Cantor*. In *Cantor*, this Court held that even a regulated utility must "comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy," such as the market for electric light bulbs there at issue. *Id.* at 596. It would defy reality to deny that the "area[ ] of the economy" in which OG&E and Trigen competed is precisely such a "competitive area[ ]." OG&E's own documents reveal that it saw Trigen as a serious competitive threat, and OG&E expressly conceded on appeal that "Trigen and OG&E are direct and substantial competitors in Oklahoma City." OG&E 10th Cir. Br. 9.

Moreover, the jury found that OG&E competed in -- indeed, had monopolized -- "the market for cooling services to commercial and government buildings in downtown Oklahoma City." 10th Cir. App. vol. III at 476 (charge). The jury's finding that the market for cooling services was the relevant market, of course, was conclusive unless the Tenth

---

[14] In contrast to the decision below, recent decisions of the Third and Ninth Circuits have recognized that *Ticor Title* requires that immunity be denied where the particular conduct at issue was not actively supervised. *See A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, ___ F.3d ___, ___, 2001 WL 708447, at *16-17 (3d Cir. June 19, 2001) (acknowledging that "[t]he States actively and continually monitor the implementation of *portions* of the Multistate [tobacco] Settlement Agreement," but denying immunity "because the States' supervision does not reach the parts of the Multistate Settlement Agreement that are the source of the antitrust injury. *It is the conduct that violates the antitrust laws that states must 'actively supervise' in order for Parker immunity to attach.*") (emphasis added); *Snake River Valley Elec. Ass'n v. PacifiCorp*, 238 F.3d 1189, 1195 (9th Cir. 2001) (holding that PacifiCorp was not immune because Idaho did not "review the specific conduct at issue").

Circuit could hold that judgment as a matter of law was required on that factual issue under Fed. R. Civ. P. 50's strict standard. No such holding would have been possible on the record here, and the Tenth Circuit in any event never even mentioned the jury's finding or Rule 50.

Nonetheless, the Tenth Circuit held that *Cantor* did not apply here because "OG&E is selling only one thing -- electricity at state-regulated rates." App. 11a. Although this portion of the decision below is far from clear, the Tenth Circuit appears to have held that OG&E could not have participated in an unregulated market within the meaning of *Cantor* so long as OG&E sold only electricity. *See* App. 11a (stating that Trigen "contends" that OG&E participated "in the unregulated cooling services market. We disagree. First, OG&E is selling only one thing -- electricity at state-regulated rates."). The court's simplistic focus on what "OG&E is selling," however, misses the point.

In the first place, as this Court has held, markets are not defined by what the litigants are "selling," but rather by what consumers are buying. *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482 (1992) (holding that market definition depended on "a factual inquiry into the 'commercial realities' faced by consumers"); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956) ("commodities reasonably interchangeable by consumers make up that 'part of the trade or commerce,' monopolization of which may be illegal"). Even if a company "sells" only a single product, it may participate in numerous markets. *See also United States v. Continental Can Co.*, 378 U.S. 441, 452-58 (1964).

Second, as explained above, this Court's precedents make clear that private-party immunity turns on the relationship between the State and the challenged *conduct* -- not on what the defendant "is selling." Because of the requirement that the particular anti-competitive *conduct* at issue have been actively supervised, a party may be immune

for certain conduct, but not immune for other conduct, even if the party produces only one product or competes in only one market. Put simply, immunity attaches to conduct, not to products or markets. In *Ticor Title*, for example, the relevant question was not whether the defendants' title search and examination businesses were "regulated products" or "regulated markets" -- they surely were, to some extent and in some respects -- but rather whether the "particular anticompetitive conduct" at issue had been "approved by the State." 504 U.S. at 637.

Accordingly, the Tenth Circuit's statement that OG&E "is selling only one thing" cannot obscure the reality that OG&E was "engage[d] in business activity in [a] competitive area[ ] of the economy." *Cantor*, 428 U.S. at 596.[15] Just as this Court held that Detroit Edison's conduct in the competitive area of light bulb distribution was governed by "antitrust standards," OG&E's unsupervised conduct in the competitive area of cooling services is not immune. *Cf. Ticor Title*, 504 U.S. at 636 (observing that a State "may regulate its public utilities without authorizing monopolization in [an unregulated] market"). Under the Tenth Circuit's expanded immunity doctrine, however, so long as OG&E does not "sell" another product, OG&E is immune from liability for anything and everything that it might do, whether or not the challenged conduct consists of charging approved rates and whether or not the State

---

[15] In addition to being legally irrelevant, the Tenth Circuit's statement also ignores that OG&E in fact did offer bundled services, including financing packages and construction guarantees. 10th Cir. Supp. App. at 70-71 (OG&E proposal stating that "Our Design/Build Team will install a central plant at the Myriad Convention Center" and offering financing). Nor (contrary to the Tenth Circuit's belief) can one customer's decision to decline OG&E's offer of these services change the fact that OG&E offered them. *See* App. 12a n.1.

authorized or supervised the challenged conduct. This holding cannot be reconciled with this Court's precedents.[16]

* * * *

Because the view of private-party immunity adopted by the Tenth Circuit threatens far-reaching practical consequences in conflict with this Court's precedents and the fundamental national policy in favor of competition, *certiorari* should be granted.[17]

---

[16] Finally, in holding that OG&E could not have competed in the market for cooling services because OG&E "does *not* sell the electric chillers that are necessary for cooling," App. 11a (emphasis in original), the Tenth Circuit made a basic error. Products and services need only be reasonably interchangeable to be in the same market, and companies need not provide an identical package of services to be competitors. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966). The unrebutted evidence in this case was that cooling services consumers viewed OG&E and Trigen as the sole relevant competitors, and the cost of electric chillers alone did not significantly affect their choice. 10th Cir. App. vol. IX at 2307-17, 2352-53. Accordingly, the fact that a cooling services consumer that chooses OG&E needs the additional input of a chiller is of no moment.

[17] The terse holding below that Trigen's state-law antitrust and tortious interference claims are "collateral attacks" on OCC orders that must be brought before the OCC, *see* App. 13a-14a, was premised upon the same erroneous holding that this case involved no unregulated conduct. *See* App. 14a (asserting erroneously and without citation that "the heart of Trigen's complaint is that OG&E's rates are too low"). In addition to being premised upon the error of federal law for which Trigen seeks *certiorari*, the court's state-law decision patently conflicts with decisions of the Oklahoma Supreme Court holding that because of "the inability of the [OCC] to entertain a suit for money damages," a claim "for breach of a duty where damages are sought [falls] particularly within the province of the district courts." *MM Res., Inc. v. Huston*, 710 P.2d 763, 765 (Okla. 1985); *see also, e.g., Kingwood Oil Co. v. Hall-Jones Oil Corp.*, 396 P.2d 510, 512 (Okla. 1964) (holding that the OCC has no jurisdiction to hear "an action for damages sounding in tort"). While Trigen does not seek *certiorari* to review the correctness of this decision under Oklahoma law, Trigen respectfully requests that this Court vacate the judgment of the court below in its entirety so that the court may reconsider the state-

CONCLUSION

For the reasons stated, *certiorari* should be granted.

Respectfully submitted,

Bernays T. Barclay
KING & SPALDING
1185 Avenue of the Americas
New York, NY 10036
(212) 556-2100

Griffin B. Bell
Kevin R. Sullivan
Counsel of Record
Jeffrey S. Bucholtz
KING & SPALDING
1730 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

July 30, 2001

Attorneys for Petitioner

---

law question "free from the compulsion of an erroneous view of federal law," *Hicks v. Feiock*, 485 U.S. 624, 640 (1988) (citing *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984)); *see also Ohio v. Reiner*, 121 S. Ct. 1252, 1254 (2001) (per curiam), and, if appropriate, certify the state-law question to the Oklahoma Supreme Court, *see* 20 Okla. Stat. § 1601 *et seq.*; *Leck v. Continental Oil Co.*, 800 P.2d 224, 228 (Okla. 1989) (in response to certified question from court below, holding that "[t]he district court *does* have subject matter jurisdiction to hear a damage action . . . .") (emphasis in original).

INDEX

APPENDIX Page

A. Opinion of the United States Court of Appeals for the Tenth Circuit (April 3, 2001) 1a

B. Amended Judgment of the United States District Court for the Western District of Oklahoma (January 25, 2000) 16a

C. Order of the United States District Court for the Western District of Oklahoma on post-trial motions (January 25, 2000) 18a

D. Order of the United States Court of Appeals for the Tenth Circuit denying rehearing and rehearing *en banc* (May 1, 2001) 23a

E. Constitutional and Statutory Provisions 25a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 00-6047 and 00-6068

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Plaintiff-Appellee/Cross-Appellant,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Defendant-Appellant/Cross-Appellee,

EDISON ELECTRIC INSTITUTE,

Amicus Curiae.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 96-CV-1595-L)

[Filed April 3, 2001]

Paul D. Clement (Kevin R. Sullivan, Jeffrey S. Bucholtz and Jeffrey S. Spigel, King & Spalding, Washington, DC, and James A. Kirk, James M. Chaney, Allen Campbell, Kirk &

Chaney, Oklahoma City, OK, on the briefs), for Plaintiff-Appellee-Cross-Appellant.

Deborah H. Bornstein (John T. Cusack, with her on the briefs, Patrick J. Kelleher, Steven S. Shonder, Myriam Pierre Warren, Gardner, Carton & Douglas, Chicago, IL and Burck Bailey, Warren F. Bickford, IV, Dino E. Viera, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, OK, on the briefs), for Defendant-Appellant-Cross-Appellee.

Barbara A. Hinden (Edward H. Comer, on the brief), Edison Electric Institute, Washington, DC, for Amicus Curiae.

Before KELLY and BRISCOE, Circuit Judges, and MURGUIA*, District Judge.

Paul KELLY, Jr., Circuit Judge.

Trigen-Oklahoma Energy Corp. ("Trigen") sued Oklahoma Gas & Electric ("OG&E") in federal district court, alleging violations of the federal antitrust laws, Oklahoma antitrust laws, and Oklahoma tort law. A jury returned a verdict for Trigen on all counts except attempted monopolization, 15 U.S.C. § 2. The court awarded Trigen over $20 million in damages. OG&E appeals the jury's verdict and Trigen cross-appeals the damages award. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we find that OG&E is immune from federal antitrust liability under the state action doctrine and that Trigen's remaining claims are within the exclusive jurisdiction of the Oklahoma Corporation Commission ("OCC"), we reverse.

---

* The Honorable Carlos Murguia, District Judge, United States District Court of Kansas, sitting by designation.

Background

A. The Parties

Appellant-Defendant Oklahoma Gas & Electric Co. ("OG&E") is a regulated electric utility that serves communities in Oklahoma and Arkansas. The OCC and the Arkansas Public Service Commission regulate the rates, terms, and conditions for OG&E's retail electricity sales. The Federal Energy Regulatory Commission regulates OG&E's wholesale electricity sales. Aplt. Br. at 8.

Trigen, a wholly-owned subsidiary of Trigen Energy Corporation, operates urban and industrial "district heating-and-cooling systems" around the country. VI Aplt. App. at 1181-82. In 1989, Trigen entered the Oklahoma City market by acquiring district heating-and-cooling plants from another company. At its plants, Trigen produces steam and chilled water, which are then pumped from a central station through Trigen's underground pipeline to Trigen's customers. In order to use Trigen's system, buildings must be accessible to Trigen's underground pipeline. Trigen's Oklahoma City sales are not regulated. *Id.* at 8-9.

OG&E and Trigen compete indirectly in Oklahoma City. OG&E attempts to persuade Trigen's customers to purchase cooling equipment ("chillers") from a third party and install it in the customers' buildings. Buildings that use electric chillers consume more electricity for cooling than buildings served by Trigen. Obviously, buildings with electric chillers for cooling also do not need Trigen's services. *Id.* at 9; Aplee. Br. at 3. Significantly, without a chiller, OG&E's electricity is not a substitute for Trigen's district-cooling system. OG&E only sells electricity -- it does not manufacture or sell chillers. OG&E also has no control over its electricity prices as its rates are set by the OCC. Aplt. Br. at 10.

B. The Conduct at Issue

At trial, Trigen sought twenty years of lost profits from OG&E based on three allegedly anticompetitive incidents. First, Trigen and OG&E competed for Oklahoma County's buildings. The County had originally signed a contract with Trigen in December 1989. However, this contract lapsed at the end of every fiscal year, as the Oklahoma Constitution prohibits political subdivisions from entering into contracts exceeding one fiscal year. I Aplt. Sep. Add. Ex. 85, ¶¶ 2-3. In 1993, the County Board became dissatisfied with Trigen's rates and began to investigate installing on-site electric chillers. OG&E conducted a study for the County that concluded the County could save significant amounts of money by installing on-site chillers. Convinced by the study, the County Board began negotiations with Trigen, with Trigen ultimately agreeing to reduce the County's capacity charge by about $200,000 annually. At trial, Trigen sought to regain these "lost profits" as damages from OG&E. Aplt. Br. at 17-18; Aplee. Br. at 5-7.

Second, OG&E and Trigen competed to win the contract to serve the City's Myriad Convention Center. The City ultimately selected OG&E, after OG&E offered to include the City in the experimental Real Time Pricing ("RTP") tariff recently approved by the OCC. Aplt. Br. at 18. Under the RTP tariff, the customer is given a schedule of hourly prices a day (or a week) in advance, and the customer may adjust its usage accordingly. *Id.* at 20. The OCC's approval of the RTP program gave OG&E complete discretion to select customers. *Id.* An outside consulting firm, hired by OG&E, estimated (but did not guarantee) that by using RTP, the City could achieve an average rate of 1.8 cents per kilowatt-hour. *Id.* at 21. Trigen contends that OG&E misrepresented the RTP rate to the City. Aplee. Br. at 32-36. Again, Trigen sought lost profits as damages from OG&E.

Third, and finally, OG&E and Trigen competed for the

business of Corporate Tower, a non-governmental building. Trigen succeeded to the Corporate Tower contract when it entered the Oklahoma City market in 1989. Corporate Tower's contract with Trigen had a primary term of ten years, with two five-year renewal periods. Aplt. Br. at 25; II Sep. Add. Ex. DX5A at ¶ 2. The first of these renewal periods expired in September 1995. In anticipation of that expiration, OG&E attempted to persuade Corporate Tower to install an on-site cooling system. To this end, OG&E provided information to the building manager on how to evaluate on-site cooling, offered to pay for a feasibility study, sponsored an informational breakfast meeting and an energy conference, and had its lawyers evaluate Corporate Tower's contract with Trigen for legal termination options. Aplt. Br. at 24-26. Corporate Tower decided to terminate its relationship with Trigen at the end of the first contract-renewal period and install on-site chillers and heaters. At trial, Trigen sought to recover twenty years of lost profits from the loss of Corporate Tower's business based on the assumption that, but for OG&E, Trigen would have received a twenty-year contract extension. *See* I Sep. Add. Ex. PX515.

C. The Litigation

In September 1996, Trigen filed this action in federal district court alleging monopolization and attempted monopolization in violation of § 2 of the Sherman Act, 15 U.S.C. § 2; unreasonable restraint of trade and discrimination in violation of Okla. Stat. tit. 79, §§ 1, 4; and tortious interference with contract and prospective business advantage. I Aplt. App. Doc. 2 (First Am. Compl.). The trial took place in December 1998, and the jury returned a verdict for Trigen on all counts except attempted monopolization. III Aplt. App. Doc. 23. OG&E made three motions for judgment as a matter of law: during trial, XI

Aplt. App. at 3024-38, at the close of all the evidence, XII Aplt. App. at 3151, and after the jury verdict, IV Aplt. App. Doc. 35. The trial court denied the motions. XI Aplt. App. at 3072; XII Aplt. App. at 3151; V Aplt. App. Doc. 47. In January 2000, the trial court trebled the damages award and entered judgment for $20,641,548 against OG&E. V Aplt. App. Doc. 48.

Discussion

Trigen brought federal antitrust claims against OG&E, as well as state antitrust and tort claims. OG&E argues that a combination of the state action, *Noerr-Pennington,* and filed rate doctrines mandate that the court dismiss both the federal and state antitrust claims against it. OG&E also argues that the district court had no jurisdiction to hear the state tort claims against OG&E as the exclusive jurisdiction to hear such claims rests with the OCC. Because we hold that the state action doctrine mandates the dismissal of the federal antitrust claims, and that the state antitrust and tort claims are within the exclusive jurisdiction of the OCC, we decline to reach the *Noerr-Pennington* and filed rate doctrine defenses. Nor is it necessary to address OG&E's arguments concerning reversible error at trial, the damages award, or Trigen's cross-appeal.

A. The State Action Doctrine

OG&E contends that the state action doctrine immunizes its conduct from federal antitrust scrutiny in three ways: (1) all of Trigen's claims are based on OG&E's efforts to sell electricity, and OG&E's electricity sales are immune from antitrust actions because the State has chosen to regulate them; (2) OG&E's offer to the City to participate in OG&E's pilot RTP program falls within the state action doctrine because the OCC expressly approved the RTP tariffs; and (3)

the decisions of the City and County on whether or not to contract with Trigen are immune from antitrust actions, and this immunity extends to OG&E. Aplt. Br. at 32-33.

We see no significant legal difference between OG&E's first two grounds for state action immunity. The RTP program in which OG&E offered to enroll the City is just another state-regulated electricity sale. Therefore, we will treat OG&E simply as arguing that all of its regulated electricity sales are protected by the state action doctrine. This argument, standing alone, is enough to mandate dismissal of the federal antitrust claims. Accordingly, we need not address OG&E's third contention, that the City's and County's immunity under the state action doctrine should extend to OG&E.

At the outset, we must deal with the issue of waiver. Based on arguments that OG&E made at trial, Trigen argues that OG&E has waived state action immunity except with respect to OG&E's offer of the RTP rate to the city. *See* XI Aplt. Ap. at 3031; VI Aplt. App. at 1246. We disagree. Based on our review of the entire record, we find the issue of state action immunity to be pervasive throughout the litigation. OG&E clearly raised the issue of state action immunity as applying to all of its regulated electricity sales in its answer, I Aplt. App. Doc. 3, ¶ 84, in the final pre-trial order, III Aplt. App. Doc. 26, ¶¶ 4G, 5B1, 5B6, and 5B11, and in its final motion for judgment as a matter of law. IV Aplt. App. Doc. 35, ¶ 1. Significantly, in its order denying OG&E's motion, the district court did not hold that OG&E had waived state action immunity but denied the motion on the merits, albeit without analysis. V Aplt. App. Doc. 47 at 2. When first confronted with this issue during trial, the district court recognized that it could be dispositive of the entire case and queried why it was not raised in a motion for summary judgment. VI Aplt. App. at 1246. Although we agree that it is difficult to understand why OG&E did not file a dispositive motion prior to trial based on state action

immunity, OG&E was not required to do so. Finally, state action immunity is a purely legal issue and Trigen has shown no prejudice due to OG&E's alleged waiver. Therefore, under these specific circumstances, we hold that OG&E did not waive its state action immunity.

We turn to the merits of OG&E's state action immunity claim. Because Oklahoma has clearly articulated a policy to displace competition with the regulation of electric utilities and because Oklahoma actively supervises any allegedly anticompetitive conduct, the state action doctrine immunizes OG&E's regulated electricity sales from federal antitrust scrutiny. State action immunity is a question of law, which the court reviews de novo. *In re Overland Park Fin. Corp.*, 236 F.3d 1246, 1251 (10th Cir. 2001). The state action doctrine arises from *Parker v. Brown*, 317 U.S. 341, 350-52 (1943), in which the Supreme Court relied on principles of federalism and state sovereignty to hold that the Sherman Act was not intended to prohibit states from imposing restraints on competition. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court set forth a two-pronged test for determining when private parties regulated by the state are shielded from the federal antitrust laws. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," *id.* at 105 (internal quotations and citation omitted), and second, "the policy must be 'actively supervised' by the State itself." *Id.*

In order to meet the first prong of the *Midcal* test, a private party does not have to "point to a specific, detailed legislative authorization" for its challenged conduct; the State need only have made clear its intent to replace competition with a regulatory program in a particular field. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985) (internal quotations and citation omitted). In addition, the state policy does not have to compel the private party to engage in anticompetitive

conduct. If the state policy expressly permits, but does not compel, anticompetitive conduct, the private party may still qualify for state action immunity. *Id.* at 61-62.

The second prong of the *Midcal* test, the "active supervision" requirement, "is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget,* 486 U.S. 94, 100-01 (1988) (citation omitted). The active supervision requirement "mandates that the State exercise ultimate control over the challenged anticompetitive conduct." *Id.* at 101.

As a state-regulated utility, OG&E has clearly met the two-prong test for state action immunity. The Oklahoma Constitution manifests the State's intent to displace competition with regulation over electric utilities. The Oklahoma Constitution creates the OCC, Okla. Const. art. IX, § 15, and provides that the OCC "shall have the power and authority and be charged with the duty of supervising, regulating and controlling all . . . transmission companies doing business in this State, [and] in all matters relating to the performance of their public duties and their charges therefor . . . ." Okla. Const. art. IX, § 18. To that end, the OCC "shall . . . prescribe and enforce against such companies . . . such rates, charges, . . . and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just . . . ." *Id.* Any rates, charges, or rules and regulations that are inconsistent with those mandated by the OCC are "unlawful and void." *Id.* We have previously recognized Oklahoma's intent to displace competition with the regulation of public utilities, holding that the state action doctrine immunized an Oklahoma electric utility from antitrust scrutiny in the market for leased outdoor lighting. *Lease Lights, Inc. v. Public Service Co. of Okla.,* 849 F.2d 1330, 1333 (10th Cir. 1988) ("The Oklahoma Constitution

gives the [OCC] the power to regulate public utilities . . . .").

The OCC also actively supervises OG&E, meeting the second part of the test for state action immunity. The OCC has "general supervision" over OG&E, including the power to fix all of OG&E's rates for electricity and to promulgate all the rules and regulations that affect OG&E's services, operation, and management. Okla. Stat. tit. 17, § 152(A). The OCC has "full visitorial and inquisitorial power to examine such public utilities," § 152(C), as well as "the powers and authority of a court of record," Okla. Const. art. IX, § 19, with exclusive jurisdiction over claims challenging any of the OCC's actions. Okla. Const. art. IX, § 24. In *Lease Lights,* we found that the use of similar authority over an electric utility satisfied the active supervision requirement. 849 F.2d at 1334.

Although Trigen never directly addresses OG&E's argument that all of its regulated electricity sales are protected by the state action doctrine, Trigen does offer several reasons why the state action doctrine should not apply in this case. Trigen argues: (1) that "OG&E made improper payments to public officials, offered to provide discounted loans and construction-cost guarantees, disparaged Trigen, and lavishly entertained Trigen customers while sticking OG&E ratepayers with the bill," Aplee. Br. at 28; (2) that OG&E is competing in the cooling services market, which is unregulated, *id.* at 31; and (3) that OG&E misrepresented the RTP tariff, discriminated between customers in deciding who to enroll in the RTP pilot program, and has flexibility in setting RTP rates. *Id.* at 32-34. We will address each argument in turn.

1. Bribery, Conspiracy, and "Lavish Entertainment"

Trigen alleges OG&E used improper payments, undue influence, and lavish entertainment to gain business. Trigen does not spell out its legal argument here and cites to no

legal authority, but we construe Trigen as arguing that OG&E's alleged "bad acts" somehow destroy OG&E's state action immunity. However, the Supreme Court has expressly rejected this notion, holding that there is no conspiracy or bribery exception to state action immunity. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 378-79 (1991) (stating that "Congress has passed other laws aimed at combating corruption in state and local governments," and that "any action that qualifies as state action is ipso facto . . . exempt from the operation of the antitrust laws") (internal quotations and citation omitted, alteration in original). We can find no legal authority, and Trigen points us to none, that dictates that OG&E's alleged "lavish entertainment" of customers causes OG&E to forfeit state action immunity. Therefore, even if OG&E had committed these alleged "bad acts," its state action immunity would remain intact.

2. Competition in the Unregulated Cooling Market

Trigen contends that OG&E is not entitled to state action immunity because OG&E is not participating in the regulated electricity market but in the unregulated cooling services market. We disagree. First, OG&E is selling only one thing -- electricity at state-regulated rates. It does *not* sell the electric chillers that are necessary for cooling. According to Trigen's logic, OG&E must be deemed a competitor, and a potential monopolist, in every single product market that uses electricity to the exclusion of the suppliers of that market. Clearly, this is an unreasonable result.

Second, the case Trigen relies on, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), is distinguishable. In *Cantor*, the Court held that a Michigan electric utility's program distributing free light bulbs was not immune from the Sherman Act, even though the light-bulb-distribution

program was included in the state-approved tariff, because there was no evidence that the state intended to regulate the electric light bulb market. *Id.* at 598. *Cantor* involved an electric utility that was distributing an unregulated product -- light bulbs. OG&E has done no such thing. OG&E only sells electricity -- at state-regulated rates.[1]

3. RTP Pilot Program

Finally, Trigen argues that OG&E has flexibility in setting its RTP rate and that this flexibility leads to "abuse" by OG&E, including misrepresentations and discriminatory withholding of the RTP rate. Aplee. Br. at 34-36. Specifically, Trigen argues that OG&E misrepresented the tariff to the City, and that OG&E unlawfully discriminated against its customers in deciding who to enroll in the pilot program. Aplee. Br. at 33. Trigen contends that OG&E's flexibility in determining the RTP rate means that the RTP rate is not actively supervised by the State and, therefore, outside the scope of state action. *Id.* at 33-34.

We disagree with Trigen's premise. OG&E has no discretion in setting its electricity rates. The RTP rate is governed by strict formulas defined in the OCC-approved tariff. Aplt. Reply Br. at 7. Under the RTP program, the *customer* is given discretion in determining his electricity rate by determining at what times of day to use electricity. Accordingly, OG&E could only offer the City an *estimate* put together by an outside consulting firm, based on certain assumed usage patterns.

Trigen's discrimination claim clearly is barred by the

---

[1] At oral argument, Trigen's counsel argued that OG&E was able to manipulate its rates by offering inducements to the City such as financing packages and capital-cost guarantees for the construction of an on-site cooling plant. However, as OG&E points out, and Trigen concedes, the City declined these offers, Aplt. Br. at 19; Aplee. Br. at 8, leaving no justiciable issue before this court.

state action doctrine. In its approval of the RTP tariffs and pilot program, the OCC explicitly stated in its Final Order that "the proposed Day-Ahead and Week-Ahead Pricing Tariffs will not result in unjust or undue discrimination." III Aplt. Sep. Add. Ex. DX318 at 4. Even if the RTP program *did* result in discrimination, it would still be at the heart of the state action doctrine. The state action doctrine applies to immunize anticompetitive conduct from the federal antitrust laws when that conduct is undertaken pursuant to a clearly-articulated state policy that is actively supervised by the State. If Oklahoma wants to allow OG&E to discriminate in order to pursue a state policy and Oklahoma actively supervises the conduct at issue, than *[sic]* OG&E may discriminate and still fall within the bounds of the state action doctrine.

In sum, Trigen's arguments that OG&E's regulated electricity sales fall oustide of state action immunity are unpersuasive. Therefore, because OG&E is acting in accordance with a clearly-articulated state regulatory program and because it is actively supervised by the OCC, we hold that OG&E's conduct falls within the heart of the state action doctrine and that the federal antitrust claims must be dismissed.

B. The Remaining State Antitrust and Tort Claims

Next, we address Trigen's remaining state antitrust and tort claims. Because we construe all of Trigen's state law claims as collateral attacks on OG&E's filed rates, we hold that these claims are within the exclusive jurisdiction of the OCC. OG&E raises a narrower version of this argument on appeal, contending that only Trigen's state tort claims are within the exclusive jurisdiction of the OCC.[2] Aplt. Br. at 63-64. However, as we have an "independent obligation" to

[2] Trigen never responds to this argument.

determine our own jurisdiction, we raise this issue sua sponte. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990); *accord State Farm Mut. Auto Ins. Co. v. Narvaez,* 149 F.3d 1269, 1270-71 (10th Cir. 1998).

Oklahoma law subjects all grievances with tariffs to the exclusive jurisdiction of the OCC. The OCC has the powers of a "court of record," and must "enforce compliance with any of its lawful orders or requirements . . . ." Okla. Const. art. IX, § 19. "The authority of the [OCC] . . . to prescribe rates . . . [and] charges, . . . for transmission companies, shall . . . be paramount . . . ." Okla. Const. art. IX, § 18. An appeal from an order of the OCC "affecting the rates, charges, services, practices, rules or regulations of public utilities . . . shall be to the Supreme Court [of Oklahoma] only . . . ." Okla. Const. art. IX, § 20. Finally, plaintiffs who bring lawsuits or collateral proceedings against public utilities may not question the "reasonableness, justness, or validity of any rate, charge, service, practice, rule, regulation or requirement . . . prescribed by the [OCC] . . . ." Okla. Const. art. IX, § 24.

The Supreme Court of Oklahoma has made clear that it is willing to look behind the form in which an action is brought to determine whether the action is actually a collateral attack on rates. *See Wilson v. Harlow,* 860 P.2d 793, 800-01 (Okla. 1993) (holding that a petition styled as a negligence and intentional tort action was in reality a collateral attack on rates and, therefore, within the exclusive jurisdiction of the OCC). In this case, in each of the trhee competitive incidents of which Trigen complains, the heart of Trigen's complaint is that OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business. The only remedy Trigen seeks is "lost profits" as damages from OG&E. Therefore, we conclude that Trigen's state antitrust and tort claims are in fact collateral attacks on OG&E's filed rates, and that such attacks lie within the exclusive jurisdiction of the OCC.

We REVERSE the judgment and the case is remanded with directions to DISMISS the complaint. OG&E's motion to supplement the record is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Plaintiff,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Defendant.

No. CIV-96-1595-L

AMENDED JUDGMENT
[filed January 25, 2000]

This action came on for trial before the court and a jury, Honorable Tim Leonard, United States District Judge, presiding. The issues have been duly tried and the jury has duly rendered its verdict. In accordance with the jury's verdict and in keeping with the court's order of this date regarding damages,

IT IS ORDERED AND ADJUDGED that plaintiff Trigen-Oklahoma City Energy Corporation shall have and recover on its claims against defendant Oklahoma Gas & Electric Company as follows:

On plaintiff's claims for (1) monopolization in violation of § 2 of the Sherman Act, (2) unreasonable restraint of trade

in violation of Oklahoma's antitrust laws, and (3) discrimination in violation of Oklahoma's antitrust laws, and treble damages pursuant to 15 U.S.C. § 15, the sum of **$20,462,322.00**;

On plaintiff's tort claim, the sum of **$179,226.00**;

For a **total judgment in the amount of $20,641,548.00.**

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall have and recover interest thereon at the rate as provided by law, and the costs of the action pertaining to these claims.

Entered this 25th day of January, 2000.

/s/ Tim Leonard
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Plaintiff,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Defendant.

No. CIV-96-1595-L

ORDER
[filed January 25, 2000]

This matter is before the court on several post-trial motions of the parties. After a lengthy trial to the jury, a verdict was rendered in favor of plaintiff Trigen-Oklahoma City Energy Corporation on its antitrust and tort claims and against defendant Oklahoma Gas & Electric Company. On February 19, 1999, judgment was entered by the court in accordance with the jury's verdict, which included a punitive damages award in the amount of 10 million dollars. In its order of the same date, the court noted that the judgment did not include statutory treble damages, but that the court would consider awarding statutory damages on plaintiff's antitrust claims if presented with a timely filed post-trial motion

showing that such damages would not represent impermissible duplicate damages.

Defendant has filed a Motion for Judgment as a Matter of Law to which plaintiff has responded. Judgment as a matter of law is proper "only if the evidence points but one way and is susceptible to no reasonable inference which may support the opposing party's position." *Q.E.R., Inc. v. Hickerson,* 880 F.2d 1178, 1180 (10th Cir. 1989). In ruling on the motion for judgment as a matter of law, the court must view the evidence and the inferences in the light most favorable to the plaintiff, the nonmoving party. *Aguinaga v. United Food & Commercial Workers Int'l,* 993 F.2d 1463, 1469 (10th Cir. 1993), *cert. denied,* 114 S. Ct. 880 (1994). Based on this standard, the court concludes that defendant's motion for judgment as a matter of law must be denied. Notwithstanding defendant's arguments to the contrary, there was sufficient evidence when viewed in the light most favorable to plaintiff to support the jury's verdict. The court is not to rewrite the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury. *Joyce v. Atlantic Richfield Co.,* 651 F.2d 676, 680 n.2 (10th Cir. 1981). Thus, defendant's Motion for Judgment as a Matter of Law should be and hereby is denied.

Both parties have filed motions to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Plaintiff seeks to obtain the maximum judgment possible without duplication of damages. Defendant asserts that plaintiff is not entitled to any damages at all. Defendant argues that if judgment is entered in plaintiff's favor it should (1) eliminate a duplicative award of actual damages to plaintiff, (2) prevent an award of actual damages to plaintiff in an amount exceeding the amount of actual damages requested by plaintiff at trial, and (3) prevent a duplicative award of punitive and treble damages. Defendant expands upon these arguments further in its response to plaintiff's motion to alter or amend and argues that plaintiff's "arithmetic gymnastics"

cannot salvage the "ambiguous" verdict of the jury.

The court has consistently acknowledged its intent and duty to see that the judgment does not include an impermissible duplicative recovery or windfall to plaintiff. The process of conforming the jury's verdict to a proper judgment does not render the jury's verdict ambiguous as defendant claims, however.[1] No party has suggested that the jury should have been allowed or required to consider the issue of treble damages on plaintiff's antitrust claims. The matter of trebling damages on these claims is for the court. As for the claims that were properly submitted to the jury, the court has already found that sufficient evidence was presented at trial to support the jury's verdict. The court's task is to enter a proper judgment on the evidence that was presented at the trial, recognizing that plaintiff may not recover both punitive damages under a state tort law claim and treble damages under a federal statutory claim, where the state and federal claims arise from the same operative facts and merely represent alternative theories of recovery. *Mason v. Oklahoma Turnpike Authority,* 115 F.3d 1442, 1459 (10th Cir. 1997).

Upon consideration of all the evidence that was presented at trial, and upon consideration of the arguments of the parties pertaining to the duplicative damages issue, the court finds that plaintiff's antitrust and tort claims awards are indeed based upon the same operative facts and that an award of both treble and punitive damages should not be permitted. Although, with the benefit of hindsight, it is possible to connect disparate elements of some of the claims with separate items of damage, the evidence at trial demonstrated that plaintiff's antitrust and tort claims consisted of alternative theories of recovery and were based

---

[1] By failing to make a proper objection before the jury was discharged, defendant has arguably waived any argument that the jury verdict was ambiguous. *See Unit Drilling Company v. Enron Oil & Gas Company,* 108 F.3d 1186, 1191 n.6 (10th Cir. 1997).

on the same underlying conduct. Plaintiff's request to include both treble damages and punitive damages in the judgment is therefore denied.

The maximum amount of actual antitrust damages (*i.e.*, damages before trebling) awarded by the jury is $6,820,774.00. The jury awarded in excess of this amount on one of plaintiff's tort claims (tortious interference with prospective economic advantage). Upon the evidence presented at trial, then, it is reasonable to find that the amount in excess of the antitrust award (*i.e.*, $179,226.00) is not duplicative of the antitrust damages. Accordingly, a proper judgment should include actual antitrust damages in the amount of $20,462,322.00 ($6,820,774.00 trebled pursuant to 15 U.S.C. § 15), and an additional award in the amount of $179,226.00, representing the difference between the high tort claim award and the actual antitrust award, for a total judgment for plaintiff in the amount of $20,641,548.00. The court's amended judgment in this amount will issue on a separate document in accordance with the Federal Rules of Civil Procedure.

The court finds that defendant's Motion for New Trial should also be denied. A new trial may be granted when the verdict is against the evidence or when prejudicial error has entered the record. *McHargue v. Stokes Division*, 912 F.2d 394, 396 (10th Cir. 1990). The court is thoroughly familiar with the record and proceedings at trial. Upon consideration of defendant's motion and plaintiff's response, and mindful of the standard for granting a new trial, the court concludes that a new trial is not warranted. In this connection, the court finds that the additional materials sought to be submitted by defendant would not alter the court's conclusion that a new trial is not warranted. Accordingly, defendant's Motion for a New Trial is denied and defendant's request for leave to submit additional authority to the court is also denied.

In summary, defendant's Motion for Judgment as a

Matter of Law [Doc. No. 173-1] is DENIED. The parties' cross-motions to Alter or Amend the Judgment [Doc. Nos. 168 & 172] are GRANTED IN PART and DENIED IN PART as more fully set forth above. Defendant's Motion for New Trial [Doc. No. 173-2] is DENIED. Defendant's Application for Leave to Submit Notice to the Court of Additional Authority [Doc. No. 193] is also DENIED.

It is so ordered this 25th day of January, 2000.

/s/ Tim Leonard
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 00-6047 and 00-6068

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Plaintiff-Appellee/Cross-Appellant,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Defendant-Appellant/Cross-Appellee,

EDISON ELECTRIC INSTITUTE,

Amicus Curiae.

ORDER
filed May 1, 2001

Before KELLY and BRISCOE, Circuit Judges, and MURGUIA, District Judge*.

The petition for rehearing filed by Trigen-Oklahoma City

---

* The Honorable Carlos Murguia of the United States District Court for the District of Kansas, sitting by designation.

Energy Corporation is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service requested that the court be polled on rehearing en banc so the suggestion for rehearing en banc is also denied.

Entered for the Court

Patrick Fisher, Clerk of Court

By /s/ Opal A. Carter
Deputy Clerk

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Statutes

15 U.S.C. § 2 provides:

> Monopolizing trade a felony; penalty
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15 provides in relevant part:

> (a) * * * any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . . .

Oklahoma Constitutional Provisions

Article IX, § 18 of the Oklahoma Constitution provides:

> Powers and duties -- Notice before taking action -- Process for witnesses -- Authority of Legislature -- Municipal powers.
>
> The [Corporation] Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; . . . and shall, from time to

time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice . . . . The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws . . . .

Article IX, § 19 of the Oklahoma Constitution provides:

Powers of court of record -- Additional powers -- Failure or refusal to obey orders.

In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the

powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally . . . .

Article IX, § 20 of the Oklahoma Constitution provides:

Appeals to Supreme Court -- Other courts to have no jurisdiction -- Mandamus and prohibition.

From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action, or by the State, directly to the Supreme Court of the State of Oklahoma, in the manner and in the same time in which appeals may be taken to the Supreme Court from the District Courts, except that such an appeal shall be of right . . . .

An appeal from an order of the Corporation Commission affecting the rates, charges, services, practices, rules or regulations of public utilities, or public service corporations, shall be to the Supreme Court only, and in all appeals to which the State is a party it shall be represented by the Attorney for the Corporation Commission, and the Attorney General, or his duly authorized representative. * * *

No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties; provided, however, that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.

Article IX, § 24 of the Oklahoma Constitution provides:

> Right of Action Not Affected -- Questioning Action of Commission.
>
> The right of any person, firm, corporation, receiver or trustee to institute and prosecute in the ordinary courts of justice, any action, suit or motion against any public utility, or public service corporation, or any individual, person, firm, corporation, receiver or trustee, engaged in the public utility business, shall not be extinguished or impaired by reason of any fine or other penalty which the Corporation Commission may impose or be authorized to impose upon such public utility, public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, because of its breach of any public duty or because of its failure to comply with any order or requirement of the Corporation Commission; but in no such proceeding by any person, firm, corporation, receiver or trustee, against such public utility, public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, nor in any collateral proceeding, shall the reasonableness, justness, or validity of any rate, charge, service, practice, rule, regulation or requirement, theretofore prescribed by the Corporation Commission, within the scope of its authority, and then in force, be questioned.

Oklahoma Statutes

17 Okla. Stat. § 152 provides:

> Commission's Jurisdiction Over Public Utilities -- Examination of requests for review of rates and charges.
>
> A. The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe and promulgate rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted.
>
> B. 1. When any public utility subject to general supervision pursuant to this section or to Section 158.27 of this title shall file with the Commission a request for review of its rates and charges, such request shall be given immediate attention.
>
> 2. In the exercise of this responsibility, the Commission shall complete any examination of such request for a review of its rates and charges within one hundred twenty (120) days from the date such application for review of its rates and charges is filed.
> * * *
>
> C. The Commission shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controlled or operated, the value of same, the

management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the Constitution and laws of this state, and with the orders of the Commission.

Supreme Court, U.S.
FILED
SEP 27 2001
CLERK

No. 01-178

In The

SUPREME COURT OF THE UNITED STATES

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Petitioner,

v.

OKLAHOMA GAS AND ELECTRIC COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

DEBORAH H. BORNSTEIN
JOHN Z. LEE
FREEBORN & PETERS
311 South Wacker Drive
Chicago, Illinois 60606
(312) 360-6000

JOHN T. CUSACK
Counsel of Record
PATRICK J. KELLEHER
GARDNER, CARTON & DOUGLAS
321 North Clark Street
Chicago, Illinois 60610
(312) 644-3000

Attorneys for Respondent

September 28, 2001

QUESTION PRESENTED

Whether the Court should deny a petition for *certiorari* that is based on a strained interpretation of isolated phrases in the Court of Appeals' opinion, where: (i) the court correctly stated the controlling legal standard for state action antitrust immunity and correctly applied that standard to the facts based on its review of the entire record, (ii) the court's decision is not in conflict with a decision from any other Circuit, and (iii) further review would not change the result because this Court likely would affirm on other dispositive grounds, including *Noerr-Pennington* immunity, the filed-rate doctrine and petitioner's failure to prove antitrust injury or a legally relevant product market.

CORPORATE DISCLOSURE STATEMENT

Oklahoma Gas and Electric Company ("OG&E") is a wholly-owned subsidiary of OGE Energy Corp. OGE Energy Corp. is an Oklahoma corporation which is headquartered in Oklahoma City. OG&E Energy Corp.'s stock is publicly traded on the New York Stock Exchange and the Pacific Exchange.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

NOTE ON CITATIONS x

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

OG&E's Regulated Electricity Sales And Trigen's Unregulated Cooling Services 2

The Three Competitive Incidents At Issue 3

The Tenth Circuit's Opinion 6

SUMMARY OF ARGUMENT 7

REASONS TO DENY THE WRIT 10

I. Trigen's Petition Should Be Denied Because The Tenth Circuit Correctly Applied Supreme Court Precedent When It Held That Trigen's Claims Were Barred Under The State Action Doctrine 10

A. The Court Of Appeals Properly Held That The State Of Oklahoma Has A Clearly Articulated Policy To Replace Competition With Regulation Of Electric Services 11

B. The Court Of Appeals Properly Held That The OCC Actively Supervises OG&E's Electricity Sales And Marketing Activities 12

TABLE OF CONTENTS – Continued

Page

C. The Court Of Appeals' Decision Is Consistent With *Ticor, Patrick,* And *Cantor* 14

D. The Court Of Appeals Correctly Followed *Omni Outdoor* 18

E. Because OG&E Acted With The City And County, OG&E's Activities Also Were Entitled To State Action Immunity Under The Less Stringent *Town Of Hallie* Standard .. 19

II. Because There Are Numerous Other Grounds On Which The Court Would Affirm In Any Event, The Question Presented By The Petition Is Largely Academic 21

A. OG&E's Attempts To Persuade The City And County To Purchase Electricity Are Immunized By The *Noerr-Pennington* Doctrine 21

B. OG&E's Use Of The RTP Tariffs Is Protected By The Filed-Rate Doctrine 22

C. Trigen Failed To Establish The Basic Elements Of A Sherman Act Section 2 Claim 23

1. Trigen Offered An Unreasonable Product Market Definition 24

2. Trigen Cannot Show That OG&E "Willfully Acquired Or Maintained" Monopoly Power 25

3. Trigen Cannot Establish Antitrust Injury 26

TABLE OF CONTENTS – Continued

Page

III. Trigen's Appeals To Policy Are Unpersuasive Because The Court Of Appeals Correctly Applied State Action Immunity, And Its Decision Will Not Affect Ongoing Deregulation .. 26

IV. Trigen's State Law Claims Are Not Before This Court 28

CONCLUSION 30

APPENDIX

A. Oklahoma Constitutional and Statutory Provisions a-1

Oklahoma Constitution, art. IX § 15 ..... a-1

11 Oklahoma Statutes § 22-101..... a-1

11 Oklahoma Statutes § 22-124..... a-2

17 Oklahoma Statutes § 151 ..... a-3

19 Oklahoma Statutes § 1..... a-4

19 Oklahoma Statutes § 734 ..... a-5

B. Day-Ahead Real Time Pricing ("RTP") Tariff (DX 330) b-1

C. Oklahoma Corporation Commission Final Order approving RTP Tariffs (May 24, 1996) (DX 318) c-1

D. OG&E's "Plan of Action" (PX 164)..... d-1

TABLE OF AUTHORITIES

Page

CASES:

Allright Colorado, Inc. v. City & County of Denver, 937 F.2d 1502 (10th Cir. 1991), *cert. denied*, 505 U.S. 983 (1991) 20

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 23

Armstrong Surgical Center v. Armstrong County Memorial Hospital, 185 F.3d 154 (3d Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) 22

AT&T v. Central Office Telephone, Inc., 524 U.S. 214 (1998) 22, 23

Automatic Salvage Transport, Inc. v. Wheelabrator Environmental Systems, 155 F.3d 59 (2d Cir. 1998) 20

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 24, 26

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)..... *passim*

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 16, 17, 26

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 8, 26

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) ..... *passim*

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 15

Cost Management Servs., Inc. v. Washington Natural Gas. Co., 99 F.3d 937 (9th Cir. 1996)..... 15

DFW Metro Line Servs. v. Bell Telephone Corp., 988 F.2d 601 (5th Cir. 1993)..... 15

TABLE OF AUTHORITIES – Continued

Page

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 21

FTC v. Ticor Title Insurance Co., 504 U.S. 621 (1992) 8, 14, 16, 17

Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) 28

Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922) 22, 23

Lease Lights, Inc. v. Public Serv. Co. of Oklahoma, 849 F.2d 1330 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989) 11, 12

MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert denied*, 464 U.S. 891 (1983) 26

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 26

Parker v. Brown, 317 U.S. 341 (1943) 10, 19

Patrick v. Burget, 486 U.S. 94 (1988) 16, 17

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 8, 20

Stump v. Sparkman, 435 U.S. 349 (1978) 19

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 11, 19, 20

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 20, 21

United States v. Grinnell Corp., 384 U.S. 563 (1966) 23, 25

TABLE OF AUTHORITIES – Continued

Page

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) 25

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3107 (U.S. Aug. 7, 2001) (No. 01-236) 26

Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., 121 S.Ct. 1776 (2000) 28

Wilson v. Harlow, 860 P.2d 793 (Okla. 1993), *cert. denied*, 510 U.S. 1117 (1994) 29

FEDERAL STATUTES:

Section 2 of the Sherman Act, 15 U.S.C. § 2 23

28 U.S.C. § 1254 1

OKLAHOMA CONSTITUTION:

Okla.Const. art. IX § 15 2

Okla.Const. art. IX § 18 ..... 2, 11, 29

Okla.Const. art. IX § 19 29

Okla.Const. art. IX § 20 29

Okla.Const. art. IX § 24 ..... 2, 29

OKLAHOMA STATUTES:

11 Okla.Stat. § 22-101 20

11 Okla.Stat. § 22-124 20

17 Okla.Stat. § 151 ..... 2, 11

17 Okla.Stat. § 152 ..... 2, 11

TABLE OF AUTHORITIES – Continued

Page

19 Okla.Stat. § 1 20

19 Okla.Stat. § 734 20

UNITED STATES SUPREME COURT RULES:

Sup. Ct. R. 10 7

Sup. Ct. R. 14 28

NOTE ON CITATIONS

- Citations to the Tenth Circuit's Opinion are to the Opinion as reproduced in Appendix A to Trigen's Petition and appear as "Op." followed by the page number in Trigen's Appendix, *e.g.*, "Op. 5a."
- Citations to Trigen's Petition appear as "Pet.", followed by the relevant page number, *e.g.*, "Pet. 5."
- Citations to the Appendix in the Tenth Circuit appear as "A" followed by the volume and page number of the Appendix, *e.g.*, "A.III.478."
- Citations to trial exhibits are in the format, *e.g.*, "PX 5" or "DX 5." The trial exhibits were included in a four volume separate Addendum filed in the Court of Appeals.

JURISDICTION

Trigen timely invokes this Court's jurisdiction under 28 U.S.C. § 1254 to review the Tenth Circuit's decision concerning Trigen's federal antitrust claims. The Court of Appeals correctly held that there was no federal subject matter jurisdiction over Trigen's state-law claims because they were collateral attacks upon tariffs, and thus within the exclusive jurisdiction of the Oklahoma Corporation Commission ("OCC"). That decision is not comprised within the question presented by Trigen in its petition for *certiorari*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent Oklahoma Constitutional and statutory provisions are reproduced at Appendix A.

STATEMENT OF THE CASE

Trigen sued Oklahoma Gas and Electric Company ("OG&E") for antitrust and tort damages, claiming that Trigen lost business and had to reduce its prices because OG&E tried to sell three customers more electricity at state-regulated rates. Based on irrelevant evidence and erroneous instructions, the jury was permitted to award Trigen over $20 million in damages, after trebling. Having reviewed the entire record, the Court of Appeals for the Tenth Circuit reversed the antitrust judgment on state action immunity grounds. The court found that "OG&E is selling only one thing – electricity at state-regulated rates" (op. 11a), and that all of OG&E's sales of electricity were subject to comprehensive regulation and active supervision by the State of Oklahoma. The Court of Appeals rejected each reason Trigen offered as to why the state action doctrine should not apply. The Court also determined that Trigen's state antitrust and tortious interference claims were veiled attempts to collaterally attack OG&E's filed rates, which were within the exclusive jurisdiction of the OCC.

The Tenth Circuit's opinion represents a standard application of the established state action antitrust immunity doctrine. Contrary to Trigen's unsupported charges, the decision below will not impede the States' ability to deregulate electric utilities or other industries. Trigen fails to present an issue worthy of the extraordinary remedy afforded by the grant of a writ of *certiorari*.

OG&E's Regulated Electricity Sales And Trigen's Unregulated Cooling Services

OG&E's retail electricity sales in Oklahoma are pervasively regulated by the OCC, an agency established by the State Constitution. Okla. Const. art. IX § 15. The Oklahoma Constitution mandates a comprehensive regulatory structure, providing that "[t]he authority of the Commission [OCC] . . . to prescribe rates, charges, and classifications . . . for . . . transmission companies, shall . . . be paramount." *Id.* § 18. The OCC's decisions are appealable only to the Oklahoma Supreme Court, and may not be "questioned" in any other court. *Id.* § 24. The OCC is responsible for "general supervision over all public utilities, with power to fix and establish rates and to prescribe and promulgate rules . . . affecting their services, operation, and the management and conduct of their business. . . . " 17 Okla. Stat. § 152(A). The OCC's regulatory authority extends to all uses of "electric current for light, heat or power." *Id.* § 151(c).

Trigen sells heating and cooling services to customers in Oklahoma City by pumping steam and chilled water from Trigen's central plant through Trigen's underground pipeline system. Trigen's rates are not regulated.

Buildings in Oklahoma City can be cooled through the use of Trigen's services or through installed air conditioning equipment ("chillers") powered by OG&E's electricity. OG&E sells more electricity to customers with on-site chillers than it does to its customers that use Trigen's cooling services. OG&E does not sell chillers. Without a chiller, OG&E's electricity is not a substitute for Trigen's

district-cooling system. OG&E does not control its own electricity prices: the OCC controls all prices for retail electricity. Nor does OG&E control the prices of chillers: those prices are set by third-party cooling equipment manufacturers.[1]

The Three Competitive Incidents At Issue

Trigen sought and was awarded damages at trial for OG&E's efforts to sell electricity, at OCC-approved rates, in "three allegedly anticompetitive incidents." Op. 4a. The first incident for which Trigen sought damages involved OG&E's efforts to persuade the County to install on-site chillers and purchase more electricity to cool the Oklahoma County jail and complex, which was cooled by Trigen's piped-in chilled water. Trigen had to offer the County a lower price in order to keep the County's business. The Court of Appeals described the competition for the County buildings:

> First, Trigen and OG&E competed for Oklahoma County's buildings. The County had originally signed a contract with Trigen in December 1989. However, this contract lapsed at the end of every fiscal year, as the Oklahoma Constitution prohibits political subdivisions from entering into contracts exceeding one fiscal year. I Aplt. Sep. Add. Ex. 85, ¶¶ 2-3. In 1993, the County Board became dissatisfied with Trigen's rates and began to investigate installing on-site electric chillers. OG&E conducted a study for the County that concluded the County could save significant amounts of money by installing on-

---

[1] As Trigen points out (pet. 2), OG&E's employees drafted a "Plan of Action" (PX 164) as to methods OG&E might employ to persuade customers that operating electric chillers is more economical than Trigen's system. Contrary to Trigen's mischaracterization, OG&E's Plan was procompetitive: it encouraged competition based on price and service. OG&E's "Plan of Action" is attached as App. D.

> site chillers. Convinced by the study, the County Board began negotiations with Trigen, with Trigen ultimately agreeing to reduce the County's capacity charge by about $200,000 annually. At trial, Trigen sought to regain these "lost profits" as damages from OG&E. Aplt. Br. at 17-18; Aplee. Br. at 5-7.

Op. 4a. The jury awarded Trigen "antitrust" damages assuming twenty years of "lost profits" purportedly suffered when Trigen lowered the price of its cooling services to Oklahoma County in response to OG&E's marketing efforts.

In the second alleged incident, Trigen sought damages for the Oklahoma City government's decision to use on-site chillers to cool the City's Myriad Convention Center ("Myriad"). The Court of Appeals explained this incident:

> Second, OG&E and Trigen competed to win the contract to serve the City's Myriad Convention Center. The City ultimately selected OG&E, after OG&E offered to include the City in the experimental Real Time Pricing ("RTP") tariff recently approved by the OCC. Aplt. Br. at 18. Under the RTP tariff, the customer is given a schedule of hourly prices a day (or a week) in advance, and the customer may adjust its usage accordingly. *Id.* at 20. The OCC's approval of the RTP program gave OG&E complete discretion to select customers. *Id.* An outside consulting firm, hired by OG&E, estimated (but did not guarantee) that by using RTP, the City could achieve an average rate of 1.8 cents per kilowatt-hour. *Id.* at 21. Trigen contends that OG&E misrepresented the RTP rate to the City. Aplee. Br. at 32-36.

Op. 4a. The Tenth Circuit rejected Trigen's premise that OG&E had misrepresented the RTP tariff:

> OG&E has no discretion in setting its electricity rates. The RTP rate is governed by strict formulas defined in the OCC-approved tariff. Aplt. Reply Br. at 7. Under the RTP program, the

> *customer* is given discretion in determining his electricity rate by determining at what times of the day to use electricity. Accordingly, OG&E could only offer the City an *estimate* put together by an outside consulting firm, based on certain assumed usage patterns.

Op. 12a.[2] Again, Trigen sought from OG&E, and the jury awarded, the "lost profits" Trigen claimed it would have earned if it had continued to serve the Myriad for 20 years.

The Court of Appeals also described the third allegedly anticompetitive incident, involving a privately owned building called Corporate Tower:

> Third, and finally, OG&E and Trigen competed for the business of Corporate Tower, a non-governmental building. Trigen succeeded to the Corporate Tower contract when it entered the Oklahoma City market in 1989. Corporate Tower's contract with Trigen had a primary term of ten years, with two five-year renewal periods. Aplt. Br. at 25; II Sep. Add. Ex. DX 5A at ¶ 2. The first of these renewal periods expired in September 1995. In anticipation of that expiration, OG&E attempted to persuade Corporate Tower to install an on-site cooling system. To this end, OG&E provided information to the building manager on how to evaluate on-site cooling, offered to pay for a feasibility study, sponsored an informational breakfast meeting and an energy conference, and had its lawyers evaluate Corporate Tower's contract with Trigen for legal termination options. Aplt. Br. at 24-26.

---

[2] The experimental RTP tariffs allowed OG&E to offer large users lower electricity rates based on marginal costs. A copy of the Day-Ahead tariff (DX 330), which is exemplary, is attached as App. B. The OCC's Final Order approving OG&E's RTP pilot program, a copy of which is attached as App. C, states: "The proposed Day-Ahead and Week-Ahead Pricing Tariffs will not result in unjust or undue discrimination." App. C at c-5.

> Corporate Tower decided to terminate its relationship with Trigen at the end of the first contract-renewal period and install on-site chillers and heaters. At trial, Trigen sought to recover twenty years of lost profits from the loss of Corporate Tower's business based on the assumption that, but for OG&E, Trigen would have received a twenty-year contract extension. *See* I Sep. Add. Ex. PX 515.

Op. 4a-5a.

The Tenth Circuit's Opinion

The Court of Appeals stated and applied the two-pronged test for state action immunity spelled out by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Op. 8a-13a. Applying *Midcal* to the facts at hand, the Court of Appeals specifically found that the State of Oklahoma has (1) manifested a clearly articulated policy to displace competition with regulation of electricity sales (op. 9a-10a), and (2) through the OCC, the State actively supervises OG&E's electricity "rates . . . services, operation and management." Op. 10a, 12a-13a.

In finding OG&E's activities immune under *Midcal*, the Court of Appeals expressly rejected Trigen's purported "cooling services" product market definition. Trigen's market definition could not be relevant because "OG&E is selling only one thing – electricity at state-regulated rates" and OG&E "does *not* sell the electric chillers that are necessary for cooling." Op. 11a. Obeying this Court's ruling in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court of Appeals rejected Trigen's contention that allegations of improper conduct by OG&E ousted the state action immunity for which OG&E's tariffed electricity sales qualify. Op. 10a-11a. The Court of Appeals observed that "the heart of Trigen's complaint is that OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business" (op. 14a), and found that Trigen's state

law claims were nothing more than "collateral attacks on OG&E's filed rates." Op. 13a-14a. Because "Oklahoma law subjects all grievances with tariffs to the exclusive jurisdiction of the OCC," these state law claims also were dismissed. *Id.*

SUMMARY OF ARGUMENT

The decision below stands for the unremarkable proposition that a state-regulated utility's sales of its state-regulated product at state-regulated prices enjoy state action immunity from the Sherman Act. Not surprisingly, there is no split in the Circuits on this uncontroversial issue. Nor does the decision below conflict with this Court's precedents. Accordingly, the petition should be denied.

The Court of Appeals, like Trigen, relied on *Midcal*, 445 U.S. 97, to state the standard for state action immunity. Op. 8a; Pet. 5, 12. The two-pronged *Midcal* standard, as advanced both by Trigen and the Court of Appeals, immunizes conduct by private actors only where there is a clearly articulated state policy to displace competition with regulation, and active state supervision. The Court of Appeals clearly announced that it would apply the strict *Midcal* standard based upon its *de novo* review of the entire record and, in particular, the evidence regarding Oklahoma's regulatory scheme and the OCC's active supervision of OG&E's conduct. Op. 6a-13a. Because Trigen's petition "assert[s] error consist[ing] of . . . the misapplication of a properly stated rule of law," to facts unlikely to be repeated in other cases, it does not warrant this Court's review. *See* Sup. Ct. R. 10.

Trigen ignores the Tenth Circuit's careful *Midcal* analysis and instead strains interpretation of isolated phrases in the opinion to argue that the Court of Appeals expanded the state action immunity doctrine by applying it based only on OG&E's "status" as a regulated utility. Pet. 2, 5-6, 7, 12, 14, 17. However, even a cursory review of the opinion reveals that the Court of Appeals applied

appropriate standards enunciated by this Court in *Midcal*, as well as *FTC v. Ticor Insurance Co.*, 504 U.S. 621 (1992), and *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), and did not alter the current formulation of the state action immunity doctrine. Op. 6a-10a.

In the end, Trigen is left only with its mantra that OG&E "monopolized" the "cooling services market" by engaging in "non-price predation". But this mantra is baseless. First, the Court of Appeals found Trigen's definition of the "cooling services market" to be fatally flawed. Trigen's own expert conceded that OG&E's electricity, alone, is not interchangeable with Trigen's cooling services: "If there is no chiller there, I am not going to get any air conditioning." A.IX.2359. Notwithstanding its own expert's testimony, Trigen's market definition and market share analysis conveniently ignored the substantial costs (and even the need) to purchase and install chilling equipment. Accordingly, the Court of Appeals properly rejected as "unreasonable" Trigen's illogical and economically unrealistic product market. Op. 11a.

Secondly, the "non-price predation" element of Trigen's mantra also fails. OG&E's conduct actually resulted in *lower* prices to the City, County and Corporate Tower. As to "each of the three competitive incidents of which Trigen complains," the Court of Appeals determined that "the heart of Trigen's complaint is that OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business." Op. 14a. In other words, all of OG&E's activities which Trigen calls "predatory" are more properly characterized as price competition. "[P]rice competition is not predatory activity." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118 (1986).[3]

---

[3] *See, e.g.*, Pet. 1, 3, 4, 7, 9, 14, 15, 16, 18. The "predatory" and "anticompetitive" misnomers appear dozens of times in Trigen's petition. Trigen also mischaracterizes OG&E's conduct when it labels it "exclusionary." Pet. 2. The "exclusionary"

While Trigen was able to persuade the jury with its unsubstantiated allegations that OG&E had committed various acts tantamount to political corruption, the Court of Appeals found that OG&E's attempts to sell electricity to local governments were not actionable under federal antitrust laws. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 378-79 (1991). The Court of Appeals properly found that none of the "bad" acts alleged by Trigen could nullify the state-action immunity for OG&E's efforts to sell more electricity at rates and on terms regulated by the OCC. Op. 11a.

Perhaps recognizing the defects in the facts and theory of its case, Trigen's principal argument for granting the writ is that the Tenth Circuit's opinion may somehow impede the States' deregulation of electric utilities and other industries. Pet. 6-12. The argument is premised on Trigen's intimation that deregulation is imminent. But the argument has no foundation in this case, because OG&E was and remains subject to pervasive and actively-supervised State regulation. Indeed, as Trigen concedes (pet. 9 n.8), Oklahoma recently postponed any plan to deregulate retail electricity sales. The decision below involves regulation, not deregulation, and will have little relevance to future cases in deregulated industries. Trigen's policy arguments raise no issue worthy of this Court's attention.

---

conduct of which Trigen complained at trial was OG&E's refusal to enroll Trigen in the RTP program. Trigen labeled this as "discriminatory" even though the OCC expressly directed OG&E to select customers for the experimental rate and the OCC expressly found that the tariff was not discriminatory. *See, e.g.*, DX 318, OCC Final Order, App. C at c-5.

REASONS TO DENY THE WRIT

I. Trigen's Petition Should Be Denied Because The Tenth Circuit Correctly Applied Supreme Court Precedent When It Held That Trigen's Claims Were Barred Under The State Action Doctrine.

The Court of Appeals' opinion is a straightforward application of state action antitrust immunity to the pervasively regulated and actively supervised efforts of a utility company to sell its product – electricity – at state-mandated rates. The Court of Appeals' statement of the controlling standard for applying the state action immunity doctrine is correct, and is not disputed by Trigen:

> The state action doctrine arises from *Parker v. Brown*, 317 U.S. 341, 350-52 (1943), in which the Supreme Court relied on principles of federalism and state sovereignty to hold that the Sherman Act was not intended to prohibit states from imposing restraints on competition. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court set forth a two-pronged test for determining when private parties regulated by the state are shielded from the federal antitrust laws. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," *id.* at 105 (internal quotations and citation omitted), and second, "the policy must be 'actively supervised' by the State itself."

Op. 8a. The Court of Appeals reviewed the state action immunity issue *de novo* (*id.*), after "review of the entire record" (op. 7a), and held that the *Midcal* standard was satisfied:

> Because Oklahoma has clearly articulated a policy to displace competition with the regulation of electric utilities and because Oklahoma actively supervises any allegedly anticompetitive conduct, the state action doctrine immunizes OG&E's regulated electricity sales from federal antitrust scrutiny.

Op. 8a.[4] Trigen overlooks both the court's correct statement of the *Midcal* test and the several pages of the opinion explaining the court's reasons for its holding. Op. 8a-11a. Instead, Trigen posits an artificial reading of the opinion to argue that the court broadened state action immunity by imposing a new "status" test. Pet. 2, 5, 6, 7, 14, 17. In reality, the Court of Appeals' decision did not turn on the status of the electric utility, but rather on the facts and circumstances of the case under the proper legal standard stated in *Midcal*.

A. The Court Of Appeals Properly Held That The State Of Oklahoma Has A Clearly Articulated Policy To Replace Competition With Regulation Of Electric Services.

As explained in the Statement of the Case, *supra* at 2-3, the Oklahoma Constitution and Statutes confer on the OCC "paramount" authority to regulate all of the rates and charges for electric services (Okla.Const. art. IX § 18), as well as the management and conduct of business of electric utilities. 17 Okla.Stat. § 152(A); § 151(c). The Court of Appeals determined that the State of Oklahoma's pervasive regulatory structure exhibits a clearly articulated policy to displace competition in electric service within the meaning of *Midcal*'s first prong.

The Tenth Circuit's decision in this case is consistent with that court's previous examination of Oklahoma's regulatory structure for electric utilities in *Lease Lights v. Public Service Co. of Oklahoma*, 849 F.2d 1330 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989). In *Lease Lights*, the Court of Appeals held that the OCC's approval and monitoring of the electric utility's rates satisfied both prongs

---

[4] Indeed the court stated and applied the strictest possible standard for state action immunity. As explained infra at 19-20, because the competitive incidents in question involved City and County decisions, the less stringent test under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), might have been applied.

of the *Midcal* test, even though the low rate allegedly "destroyed" competitors in the outdoor lighting market. 849 F.2d at 1334-35. After taking a fresh look at the issue in this case, the Court of Appeals concluded that the same clearly articulated State policy to displace competition with regulation of electricity sales applies here.

B. The Court Of Appeals Properly Held That The OCC Actively Supervises OG&E's Electricity Sales And Marketing Activities.

The record reviewed by the Tenth Circuit showed active supervision by the OCC. The OCC's review and approval, or denial, of electric rates in Oklahoma is detailed, deliberate and judicious, with the public interest of paramount importance. The process regarding the Real Time Pricing ("RTP") tariffs is of particular interest, both because OG&E's use – or alleged misuse – of those tariffs is pivotal to Trigen's theory, and as an example of the OCC's active and detailed supervision of the services offered by OG&E.

The OCC approved OG&E's two RTP tariffs as an experimental pilot program on May 24, 1996, in Final Order No. 402103, after a four-month process culminating in a public hearing. The OCC's Final Order created a two-year period for OG&E to enroll participants in the four-year pilot program, and required OG&E to submit detailed quarterly reports of OG&E's experience with RTP tariffs. OG&E complied, and its reports concerning its experience with RTP were put into evidence at trial. *See* App. C at c-6; A.XII.3101-03; DX 358, DX 363, DX 367, DX 371, DX 372.

Indeed, Trigen has participated in the OCC's active supervision of OG&E, by actively taking part in the OCC's protracted review of OG&E's rates in 1996 and 1997. In the 1996-97 rate case, Trigen raised with the OCC

concerns similar to those at issue in this case regarding the RTP tariffs and OG&E's use of the tariffs.[5]

At a January 22, 1996 public OCC hearing in the rate case, Trigen's attorney, Bernays Barclay (who also appears on the petition as one of Trigen's counsel) stated:

> Last Spring when they [OG&E] got the real time pricing program through in a few months, Trigen was asleep at the switch. We failed to warn you how that program could be misapplied to make other ratepayers pay for OG&E's naked promotional use of a rate that was supposed to be for conservation and load management. Then within hours of its approval, it offered it to the city for just that purpose. That woke Trigen up, and here we are. We don't want that to happen again.

Tr. of Proceedings, January 22, 1996, Oklahoma Corporation Commission, P.U.D. No. 960000116, at 10-11.

In its February 11, 1997 Order approving the Joint Stipulation and Settlement Agreement in the rate case, the OCC specifically rejected Trigen's position on the RTP tariffs:

> The Commission further finds that the rate reduction set forth in the Stipulation represents a balance of the competing interests of all of the Company's classes of customers. In that connection the Commission notes that all of the Company's classes of service were represented by signatories to the Stipulation. . . . Furthermore, intervenor Trigen has presented this Commission with no evidence to support its assertion that the tariffs proposed for these riders contain provisions which are unduly discriminatory on

---

[5] In its unsuccessful Petition For Rehearing *En Banc* in the Tenth Circuit, Trigen referred to proceedings in the rate case. Trigen neglected to advise the Court of Appeals that the OCC considered and rejected Trigen's similar allegations in that proceeding.

> their face. Therefore, the Commission finds that the specific relief requested by Trigen is not supported by substantial evidence. Notwithstanding this finding, however, as will be reflected below, the Director, Public Utility Division for this Commission, shall provide all parties to this proceeding with an opportunity to review the final tariffs implementing the Stipulation before they are accepted for filing.

Oklahoma Corporation Commission Order No. 409383, P.U.D. No. 960000116 (February 11, 1997), at 9-10.

Trigen actively intervened and raised its concerns regarding the RTP tariffs and OG&E's use of the tariffs in the 1996 rate proceeding (which lasted over one year).[6] These facts belie Trigen's assertion that the OCC does not actively supervise OG&E's rates.

C. The Court Of Appeals' Decision Is Consistent With *Ticor, Patrick,* And *Cantor.*

Trigen relies heavily on this Court's decision in *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992), to argue that state action immunity does not exist. However, *Ticor* stands in sharp contrast to the facts of this case. In *Ticor,* the Federal Trade Commission alleged concerted action by multiple parties: specifically, horizontal price fixing for title services by six of the nation's largest title insurance companies. In *Ticor,* this Court reviewed a Third Circuit decision which suggested that the active supervision prong of *Midcal* was satisfied by the mere existence of a state program that provided an opportunity for supervision. 504 U.S. at 637. This Court rejected the Third

---

[6] As a result of the 1996-97 rate case, OG&E's rates were lowered substantially. Due to the rate reduction supervised and approved by the OCC, OG&E's rates remain 6 percent below the regional average and 20 percent below the national average. Edison Electric Institute *Amicus Curiae* Brief filed in the Court of Appeals, at 4 (citing OG&E Energy Corp. Annual Report (1999) at 3).

Circuit's formulation as insufficient to "determine whether the State has exercised sufficient independent judgement and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Id.* at 634-35. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.* at 638.

In contrast, Oklahoma's regulatory regime offers much more than a mere opportunity for state supervision of OG&E's rates. Consistent with *Ticor*, the Tenth Circuit carefully examined the record and determined that the OCC actively supervises OG&E's activities. Op. 8a-10a, 12a-13a. For example, rejecting Trigen's argument that OG&E (and not the State) had the power to determine the RTP rate, the Court of Appeals found that "OG&E has no discretion in setting its electricity rates. The RTP rate is governed by strict formulas defined in the OCC-approved tariff." Op. 12a; *also see* App. B at b-7 – b-9. As explained above, Trigen has publicly acknowledged before the OCC that it had the opportunity to participate in this rate-setting process, but "Trigen was asleep at the switch." *See supra* at 13. Trigen's contention that the OCC does not actively supervise OG&E "is ludicrous, almost to the point of frivolity." *DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601, 607 (5th Cir. 1993) (active supervision requirement satisfied where plaintiff had already filed a challenge before the Public Utility Commission).[7] Not only is this case factually

---

[7] The remaining cases upon which Trigen relies, pet. 16 n.13, are inapposite. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), held that a home rule statute granting a municipality very broad authority to self-govern was not a "clearly articulated policy" to permit anticompetitive conduct in a cable television market. *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 942 (9th Cir. 1996) held that there was no state action immunity where a utility violated the very tariff provisions upon which it relied, by

distinguishable from *Ticor*, but the Court of Appeals strictly abided by the legal principles announced in *Ticor*.

Trigen's reliance on *Patrick v. Burget*, 486 U.S. 94 (1988), is similarly misplaced. In *Patrick*, the Oregon Board of Medical Examiners terminated the plaintiff physician's privileges to practice medicine due to substandard care. *Id.* at 97. Patrick filed a Sherman Act suit. This Court determined that the State's statutory authority was limited to reviewing a hospital's peer review *procedures;* but not the actual *decisions* of the peer review committee. *Id.* at 102. Because the restraint in *Patrick* consisted "not in the procedures used to terminate hospital privileges, but in the termination of privileges itself," *id.*, this Court found that state action immunity did not apply.

Here, however, there are no similar limits on the OCC's authority. The OCC has jurisdiction over both procedure and substance. It has statutory authority to promulgate rules and regulations affecting OG&E's services, establishes all of OG&E's electricity rates, and has exclusive jurisdiction over claims directly (or, as in this case, collaterally) challenging OG&E's rates.

Trigen also relies on *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), but to no avail. In *Cantor*, a retail druggist selling light bulbs filed suit, claiming that the local electric utility had violated the Sherman Act by giving light bulbs away without charge. As the Court of Appeals correctly explained:

> In *Cantor*, the Court held that a Michigan electric utility's program distributing free light bulbs was not immune from the Sherman Act, even though the light-bulb-distribution program was included in the state-approved tariff, because there was no evidence that the state

---

offering "off-tariff" pricing. The Oklahoma Constitution and Statutes empowering the OCC specifically authorize regulation and are not municipal "home rule" provisions. Nor does this case involve deviation from any tariff.

> intended to regulate the electric light bulb market. [428 U.S.] at 598. *Cantor* involved an electric utility that was distributing an unregulated product – light bulbs. OG&E has done no such thing. OG&E only sells electricity at state-regulated rates.

Op. 11a-12a (footnote omitted). Unlike the utility in *Cantor*, however, OG&E was not selling or distributing any product in "competitive areas of the economy," but was only attempting to market and sell one product, electricity, its core, comprehensively regulated business product.[8]

Despite the doctrinal consistency and the factual differences between the Court of Appeals' decision and this Court's decisions in *Ticor, Patrick and Cantor*, Trigen relies on mischaracterizations and wordplay to urge this Court to review the Court of Appeals' decision. For example, Trigen claims that the Court of Appeals created what Trigen calls "status-based" immunity, because it "never considered whether Oklahoma actively supervised" the challenged conduct. Pet. 15. *See also* pet. 15-16 n.12 (claiming that the Court of Appeals "did not require *any* supervision in fact"). In fact, as we have seen, the Court of Appeals did find that the OCC "actively supervised" OG&E's activities. Furthermore, Trigen's claim that the Court of Appeals did not consider whether Oklahoma had clearly articulated a policy to allow the conduct at issue, pet. 16, is directly contradicted by the text of the opinion. Op. 10a-14a. It was not the Court of Appeals that ignored these questions below – it was Trigen. As the court observed, "Trigen never directly address[ed] OG&E's argument that all of its regulated electricity sales

---

[8] In *Cantor*, this Court pointed out that "[t]here is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Id.* at 596.

are protected by the state action doctrine." Op. 10a. Nor does Trigen's petition ever "directly address" the Court of Appeals' stated reasons for its holdings. This Court should reject Trigen's attempts to employ linguistic machinations to obtain further judicial review.

D. The Court Of Appeals Correctly Followed *Omni Outdoor.*

Trigen's petition is sprinkled with accusations of purported "improper payments" and "undue influence" over Oklahoma City Council members and Oklahoma County Commissioners.[9] These charges reflect an improper double standard. Trigen likewise engages in lobbying and marketing of the City Council and County Commission. Trigen's theory of "undue influence" also is implausible: OG&E did not get the Oklahoma County business, and the Oklahoma City Council acted in accordance with the recommendations of its staff. Even more importantly, the charges are legally irrelevant to a Sherman Act case.

The Court of Appeals correctly "construe[d] Trigen as arguing that OG&E's alleged 'bad acts' somehow destroy OG&E's state action immunity." Op. 11a. The

---

[9] The "predatory" conduct upon which Trigen relies included distributing boxes of candy during the Christmas holidays, inviting City and County officials to luncheons, dinners and golf outings, and entertaining City and County officials at out-of-town business conferences and events. These activities, reasonably construed, did not constitute "political corruption" or "predatory conduct," as Trigen argued to the jury. Rather, they were marketing and sales efforts to educate potential customers regarding the benefits of OG&E's product and services, and were, therefore, procompetitive. While casting stones at OG&E, Trigen conveniently ignores the fact that it regularly engaged in similar marketing and sales activities, including hiring former City councilman Pete White (for $500,000), to lobby the City and County, making campaign contributions to County officials, buying City employees lunches, and entertaining City and County officials.

court rejected this contention, noting that "[w]e can find no legal authority, and Trigen points us to none" to support Trigen's argument. *Id.* That is because there is no such legal authority. On the contrary, as the Court of Appeals noted, this Court held in *City of Columbia v. Omni Outdoor* that there are no "corruption," "conspiracy," or "bribery" exceptions to state action (or *Noerr-Pennington*) immunity. 499 U.S. at 378-79.[10] "To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing [the Sherman Act] is not directed to that end." *Id.* at 378. Trigen's petition does not raise any important question concerning this settled area of antitrust law.

E. Because OG&E Acted With The City And County, OG&E's Activities Also Were Entitled To State Action Immunity Under The Less Stringent *Town Of Hallie* Standard.

State action immunity is proper here for reasons in addition to those stated by the Court of Appeals. Two of the three competitive incidents in this case involved direct participation by the City and County: it was the decision of the City to buy OG&E's electricity to cool the Myriad, and the County's decision to demand lower prices for Trigen to cool the County jail that resulted in the "damages" that Trigen claims. Trigen sued OG&E rather than Oklahoma City and Oklahoma County to recover the "damages" caused by the decisions of the

---

[10] In *Omni Outdoor*, this Court analogized the scope of the States' immunity required under *Parker* to the scope of judicial immunity. *See Omni*, 449 U.S. at 372 (citing *Stump v. Sparkman*, 435 U.S. 349 (1978)). In *Stump*, this Court held that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in 'clear absence of all jurisdiction.' " 435 U.S. at 357.

City and the County. Such a suit is essentially an attempt to veto government action by suing the private party rather than the governmental actors.

The actions of the City and the County in making these purchasing decisions were taken pursuant to State authorization.[11] These decisions of subsidiary political entities are immune from federal antitrust scrutiny without a showing of "active supervision" by the state, as otherwise required under the second prong of *Midcal*. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985). Because it acted jointly with these public bodies, OG&E shares in their immunity. Otherwise, the state action immunity which extends to the City and County would be destroyed. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 57 (1985) ("We decline to reduce *Parker's* holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties").

---

[11] Oklahoma has clearly articulated a policy of removing local governmental property management decisions from the competitive marketplace. Oklahoma statutes empower cities and counties to make such decisions on the basis of "best interests" standards, rather than on the basis of competitive standards such as price and quality. 11 Okla.Stat. § 22-101 (city property), § 22-124 (commercial redevelopment projects); 19 Okla.Stat. § 1 (county property), § 734 (county jails). *Omni Outdoor* noted, without deciding, that there might be a market-participant exception to *Parker*. 499 U.S. at 374-75. However, every Circuit to consider this issue has determined that there is no such exception. *See, e.g., Allright Colorado, Inc. v. Denver*, 937 F.2d 1502, 1510 & n.11 (10th Cir. 1991); *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems*, 155 F.3d 59, 80-81 (2d Cir. 1998). This is, of course, consistent with this Court's *Noerr-Pennington* jurisprudence. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (finding immune petitions to Tennessee Valley Authority to purchase coal). In any event, this issue is not presented by the decision below.

II. Because There Are Numerous Other Grounds On Which The Court Would Affirm In Any Event, The Question Presented By The Petition Is Largely Academic.

The record reflects numerous grounds that required reversal of the jury's verdict. The Court of Appeals did not need to reach most of those grounds expressly. However, the court did address several key elements of these other grounds. The Court of Appeals' assessment of those elements demonstrates that Trigen's antitrust case is doomed regardless of the outcome of the state action inquiry – thus rendering that inquiry largely academic. Even if Trigen's petition presented an important question concerning the state action doctrine (which it does not), resolution of that question should await a case where there may be an otherwise viable antitrust claim.

A. OG&E's Attempts To Persuade The City And County To Purchase Electricity Are Immunized By The *Noerr-Pennington* Doctrine.

The Oklahoma City Council decided to install electric chillers at the Myriad Convention Center. The Oklahoma County Commission decided to demand lower prices for the County Jail and Complex. It cannot be a violation of the Sherman Act for OG&E to have urged the City Council and the County Commission to make decisions favorable to OG&E. "*Noerr* shields from the Sherman Act a concerted effort to influence officials regardless of intent or purpose." *Omni Outdoor*, 499 U.S. at 380 (quoting *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (citing *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961))). As this Court explained in *Omni Outdoor*: "*Parker* and *Noerr* generally present two faces of the same coin." 499 U.S. at 383.

OG&E lobbied and marketed to the City and County at events, meals and public meetings, and hired consultants. Likewise, Trigen lobbied, marketed and hired consultants. *See supra* n.9 at 18. Trigen argued that OG&E's

marketing efforts and lobbying were not immune because they were made to "improper[ly] influence" the City and County. Such attempts to influence government decision-making, however, fall squarely within *Noerr-Pennington* protection. This Court resoundingly rejected an argument similar to Trigen's in *Omni Outdoor*, finding that "[t]here is no such conspiracy exception." 499 U.S. at 374. *See also Armstrong Surgical Center v. Armstrong County Memorial Hospital*, 185 F.3d 154, 156, 160, 162-63 (3d Cir. 1999), *cert. denied*, 520 U.S. 1261 (2000) (no antitrust liability for injury caused by state action "even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process."). Under *Omni Outdoor*, *Noerr*, and *Pennington*, all of OG&E's – and Trigen's – efforts to persuade the City and County are protected, and do not violate the Sherman Act.

B. OG&E's Use Of The RTP Tariffs Is Protected By The Filed-Rate Doctrine.

Trigen's claim concerning the City turns entirely on OG&E's offer to the City of the experimental RTP rate. That rate was contained in two tariffs filed with and approved by the OCC. The RTP tariffs expressly direct OG&E to select the limited number of participants to enroll in the RTP pilot program. *See* App. B at b-1. The filed rate doctrine bars Trigen from bringing an antitrust suit challenging the implementation of any of the terms of those tariffs, including OG&E's inclusion of the City in that program. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998); *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

The filed-rate doctrine prohibits civil suits challenging the terms of a tariff filed with a regulatory agency. Justice Brandeis explained in *Keogh*: "[L]egal rights . . . in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, *for all purposes*, the legal rate. . . . The rights as defined by

the tariff cannot be varied or enlarged by either contract or tort. . . . " 260 U.S. at 163 (emphasis added). Otherwise, the courts would be usurping the exclusive authority of state or federal regulatory agencies. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-58 (1981). The doctrine bars Sherman Act suits, *Keogh*, and all state law claims challenging a tariff. *Arkansas Louisiana Gas*.

Trigen's assertion that OG&E's consultants were wrong in their estimate of the price the City would pay under the RTP tariffs is irrelevant. The filed-rate doctrine bars any suit based on incorrect estimates of a tariffed service, "even if a carrier intentionally misrepresents its rate." *Central Office*, 524 U.S. at 222, 225. Because OG&E's selection of the City to participate in the experimental RTP tariffs simply implemented express terms in filed tariffs, the filed-rate doctrine bars Trigen's challenge to that selection. *Id.* at 223.

C. Trigen Failed To Establish The Basic Elements Of A Sherman Act Section 2 Claim.

The Court of Appeals' decision also shows that Trigen failed to establish the most basic elements of an unlawful monopolization claim under Section 2 of the Sherman Act: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Trigen could not prove unlawful monopolization because it did not define a reasonable product market, and, contrary to the principles articulated in *Grinnell*, it failed to regard the historical and regulatory reasons for OG&E's position in the sale of electricity in Oklahoma City. Furthermore, as the Court of Appeals understood, OG&E's activities were pro-competitive and pro-consumer, because they resulted in lower prices to consumers. Consequently, Trigen could not prove actionable "antitrust injury" as required by

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

1. Trigen Offered An Unreasonable Product Market Definition.

Trigen argued below and in this Court that OG&E was a competitor and an illegal monopolist in the "cooling services market," because OG&E sold the electricity used by cooling equipment. Trigen's product market definition excluded cooling equipment. Instead, Trigen's market was composed only of Trigen's district-cooling and OG&E's electricity, which are not interchangeable without cooling equipment for the electricity to power. Op. 11a.[12] Under Trigen's test, electric utilities would be unlawful monopolists in every market in which electricity is an input, including the market for "toasting bread," the market for "computer services," and the market for "television watching."

The Court of Appeals recognized the unreasonableness of Trigen's position:

> Trigen contends that OG&E is not entitled to state action immunity because OG&E is not participating in the regulated electricity market but in the unregulated cooling services market. We disagree. First, OG&E is selling only one thing – electricity at state-regulated rates. It does *not* sell the electric chillers that are necessary for cooling. According to Trigen's logic, OG&E must be deemed a competitor, and a potential monopolist, in every single product market that uses electricity to the exclusion of

---

[12] Trigen implicitly concedes this point, when it states that "a building that uses Trigen for cooling services does not need to install its own electricity-powered air-conditioning plant." Pet. 2. Trigen omitted air conditioning equipment suppliers from its product market in a blatant ploy to increase OG&E's "market share."

> the suppliers of that market. Clearly, this is an unreasonable result.

Op. 11a. Without a legally valid product market, Trigen's monopolization claim must fail. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).[13]

2. Trigen Cannot Show That OG&E "Willfully Acquired Or Maintained" Monopoly Power.

As the Court of Appeals pointed out, the "predatory" activities alleged by Trigen amounted to nothing more than OG&E's marketing and sales efforts to sell additional electricity. Trigen's charges of political corruption (which improperly swayed the jury and should never have been admitted) could not, under *Omni*, amount to the kinds of activities needed to show "willful acquisition or maintenance" of monopoly power. OG&E's "share" of the electric services market in Oklahoma City market is a result of "historic accident" and OCC regulation, so OG&E cannot have unlawful monopoly power. *Grinnell*, 384 U.S. at 570-71. Moreover, OG&E cannot have

---

[13] Trigen represents that "the relevant market was the market for cooling services to commercial and governmental buildings . . . , and the jury so found." Pet. 3 n.2, 4, 6. But it is just as likely that the jury found illegal monopolization of the electric services market. Instruction No. 2 told the jury that OG&E has a monopoly in the generation, transmission and distribution of electricity. A.III.465-65. Instruction No. 15 told the jury that the electrical power services market is one of two possible relevant markets. A.III.478-79. Instruction No. 18 told the jury to return a liability verdict if it found OG&E to possess monopoly power in a relevant market. A.III.483-84. These instructions, taken together, essentially amounted to a directed verdict of Section 2 liability for OG&E's *legal* regulated monopoly in the *electric services market* in Oklahoma City. Because there was no special interrogatory regarding the product market and no other way to tell what the jury "found", it is, at the very least, unclear what the jury found with respect to the product market.

"monopoly power" – the power to "profitably raise prices above the competitive level" – because the OCC, not OG&E, sets OG&E's prices. *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3107 (U.S. Aug. 7, 2001) (No. 01-236).

3. Trigen Cannot Establish Antitrust Injury.

As the Court of Appeals recognized, the gravamen of Trigen's complaint was that "OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business." Op. 14a. OG&E's conduct resulted in *lower prices to consumers*. Trigen cannot show antitrust injury because the alleged injury is injury to Trigen as a *competitor* and not injury to *competition*. *Brunswick*, 429 U.S. at 489. As this Court explained in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986), "[t]o hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result."

III. Trigen's Appeals To Policy Are Unpersuasive Because The Court Of Appeals Correctly Applied State Action Immunity, And Its Decision Will Not Affect Ongoing Deregulation.

Trigen's argument that deregulation will somehow be harmed or the States will be compromised if the Tenth Circuit's decision stands is misplaced. The opinion clearly acknowledges that state action antitrust immunity arises only where there is pervasive state regulation and the two-pronged *Midcal* test is satisfied. Indeed, a multitude of antitrust decisions have found unregulated activities of regulated monopolists subject to antitrust scrutiny. *See, e.g., Cantor*, 428 U.S. 579; *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The Tenth Circuit's opinion does nothing

to change the established standards applied in many cases.

The courts are accustomed to looking at the particular circumstances of each case to consider what activities are and are not regulated, and what activities are and are not immune. That is precisely what the Tenth Circuit's decision instructs lower courts to continue doing. This decision does not alter the way that lower courts will approach cases involving deregulated or partially deregulated industries. The decision will not, as Trigen argues, encourage holders of former franchised monopolies, such as telephone and gas companies, to ride roughshod over potential competitors in unregulated markets.

Traditionally, the electricity industry was largely comprised of vertically integrated, investor-owned electric utilities subject to state regulation. The retail customer had no choice among providers, and the rates, terms, and conditions of delivered electric service were fully regulated by the States. In the past decade, however, a number of States have decided to open the electric generation portion of their retail markets to competition among energy suppliers. As States choose to open their retail electric markets to competition among energy suppliers, the States retain the ultimate right to choose the degree of regulation and the state action antitrust exemption. As all or portions of retail electricity markets are opened to competition, the state action doctrine will have less relevance. However, as long as a State pervasively regulates retail electric service (as Oklahoma does today), the doctrine will remain applicable.

In any event, the trend toward partial deregulation does not come into play here. The events underlying this case occurred entirely under the traditional regime of strict regulation. Furthermore, Oklahoma has delayed opening its retail electricity markets to competition until after a task force issues a report on the effects of deregulation at the end of 2002. Pet. 9 n.8. Whether States continue to deregulate all or portions of the electric utility industry, this case cannot be used as a basis for

determining the future interplay between regulated and unregulated segments of the industry, because this case involves a fully regulated electricity market.

In fact, Trigen advances its "policy" arguments to conceal its effort to change the law. Trigen is trying to put handcuffs on companies like OG&E because they offer franchised public services of the kind that used to be called "natural monopolies". As Judge Diane Wood of the Seventh Circuit recently said in *Goldwasser v. Ameritech Corp.*, "even a monopolist is entitled to compete; it need not lie down and play dead." 222 F.3d 390, 397 (7th Cir. 2000). Trigen brought this suit because Trigen did not want OG&E to offer lower prices to the County, the City and Corporate Tower. It is Trigen's conduct, not OG&E's, that is anticompetitive.

IV. Trigen's State Law Claims Are Not Before This Court.

Trigen suggests by way of a footnote (Pet. 21-22 n.17), that this Court should vacate the Court of Appeals' judgment that the Oklahoma Constitution places Trigen's state law claims within the exclusive jurisdiction of the OCC. That request is misplaced. The state law issue is not within the question presented for *certiorari*, and thus is not before this Court. Sup. Ct. R. 14.1(a). In fact, Trigen concedes that it "does not seek *certiorari* to review the correctness of this decision under Oklahoma law. . . . " Pet. 21 n.17. Moreover, this Court "ordinarily will not consider such a state-law issue." *Wharf (Holdings) Ltd. v. United International Holdings, Inc.*, 121 S.Ct. 1776, 1781-82 (2000).

Nonetheless, as a pretext for seeking *vacatur*, Trigen asserts that the Court of Appeals' decision concerning the OCC's exclusive jurisdiction is "premised upon the error of federal law for which Trigen seeks *certiorari*. . . . " Pet. 21 n.17. Trigen's contention is false. The Court of Appeals

quoted four sections of the Oklahoma Constitution establishing the OCC as a "court of record" with certain exclusive jurisdiction and forbidding collateral attacks upon OCC-approved rates and terms. Op. 14a (quoting Okla.Const. art. IX §§ 18, 19, 20 and 24). As required by *Wilson v. Harlow*, 860 P.2d 793 (Okla. 1993), *cert. denied*, 510 U.S. 1117 (1994), the court then "look[ed] behind the form" in which Trigen's action was brought, to determine whether Trigen's claims were really a collateral attack upon the OCC's rates and terms.[14] Having made such an inquiry into the real nature of Trigen's claims, based upon its own review of the record, the Court of Appeals concluded:

> In this case, in each of the three competitive incidents of which Trigen complains, the heart of Trigen's complaint is that OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business. The only remedy Trigen seeks is "lost profits" as damages from OG&E. Therefore, we conclude that Trigen's state antitrust and tort claims are in fact collateral attacks on OG&E's filed rates, and that such attacks lie within the exclusive jurisdiction of the OCC.

Op. 14a. Stated differently, the Court of Appeals found that Trigen's state law claims were merely a tactic to complain to the courts about OG&E's OCC-approved rates. The Court of Appeals rejected Trigen's state law claims under the Oklahoma Constitution's delegation of exclusive jurisdiction to the OCC – surely a state law

---

[14] Trigen implies that simply because it sought damages, the OCC cannot have jurisdiction. That proposition is demonstrably untrue. In *Wilson v. Harlow*, the plaintiff also sought damages, and the Oklahoma Supreme Court nonetheless looked to the real nature of plaintiff's claim and found the matter within the OCC's exclusive jurisdiction. 860 P.2d at 796.

ground independent of the federal state action immunity doctrine.[15]

CONCLUSION

Trigen's petition raises no issue that merits review by this Court. The petition for *certiorari* should be denied.

Respectfully submitted,

DEBORAH H. BORNSTEIN
JOHN Z. LEE
FREEBORN & PETERS
311 South Wacker Drive
Suite 3000
Chicago, Illinois 60606
(312) 360-6000

JOHN T. CUSACK
Counsel of Record
PATRICK J. KELLEHER
GARDNER, CARTON & DOUGLAS
321 North Clark Street
Suite 3400
Chicago, Illinois 60610
(312) 644-3000

Attorneys for Respondent,
Oklahoma Gas and Electric Company

September 28, 2001

---

[15] OG&E's briefs below raised the issue of the OCC's exclusive jurisdiction under the Oklahoma Constitution, giving Trigen the opportunity to argue its position. As the Court of Appeals found, "Trigen never respond[ed] to this argument." Op. 13a n.2.

APPENDIX

Page

A. Oklahoma Constitutional and Statutory Provisions a-1

Oklahoma Constitution, art. IX § 15 ..... a-1

11 Oklahoma Statutes § 22-101 ..... a-1

11 Oklahoma Statutes § 22-124 ..... a-2

17 Oklahoma Statutes § 151 ..... a-3

19 Oklahoma Statutes § 1 ..... a-4

19 Oklahoma Statutes § 734 ..... a-5

B. Day-Ahead Real Time Pricing ("RTP") Tariff (DX 330) b-1

C. Oklahoma Corporation Commission Final Order approving RTP Tariffs (May 24, 1996) (DX 318) c-1

D. OG&E's "Plan of Action" (PX 164) d-1

APPENDIX A

OKLAHOMA CONSTITUTIONAL AND STATUTORY PROVISIONS

OKLAHOMA CONSTITUTION

Oklahoma Constitution art. IX §15

Creation – Terms of office – Vacancies

A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years. . . . In case of a vacancy in said office, the Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term.

OKLAHOMA STATUTES

11 Oklahoma Statutes §22-101

Corporate Powers of Municipalities

All incorporated municipalities shall be bodies corporate and politic, and shall have the powers to:

1. Sue and be sued;

2. Purchase and hold real and personal property for the use of the municipality;

3. Sell and convey any real or personal property owned by the municipality and make orders respecting the same as may be conducive to the best interests of the municipality;

4. Make all contracts and do all other acts in relation to the property and affairs of the municipality, necessary to the good government of the municipality, and to the exercise of its corporate and administrative powers; and

5. Exercise such other powers as are or may be conferred by law.

---

11 Oklahoma Statutes §22-124

Market Places – Municipal Buildings

The municipal governing body may purchase ground for, erect, establish, operate, and regulate retail or commercial redevelopment projects, market houses, and marketplaces. The governing body may contract with any person, company, or corporation for the erection, operation, and maintenance of such redevelopment projects, market houses, and marketplaces on terms and conditions and in such manner as may be necessary and proper pursuant to the authority granted to it by the Constitution and laws of this state to protect and preserve such projects and markets for the benefit of the municipality and its citizens. The municipal governing body may raise all necessary revenue therefor. The governing body may also provide for the erection and operation of any and all necessary buildings for the municipality.

---

17 Oklahoma Statutes §151

Public Utility Defined – Exemption of Nonprofit Water and Sewer Corporations – Washington County – Authority of Certain Beneficiaries to Condemn Property

The term "public utility" as used in Sections 151 through 155 of this title, shall be taken to mean and include every corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns, except as hereinafter provided, and except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public:

(a) For the conveyance of gas by pipeline.

(b) For the production, transmission, delivery or furnishing of heat or light with gas.

(c) For the production, transmission, delivery or furnishing electric current for light, heat or power.

(d) For the transportation, delivery or furnishing of water for domestic purposes or for power. . . .

The term "Commission" shall be taken to mean Corporation Commission of Oklahoma.

---

19 Oklahoma Statutes §1

Organized Counties to be Empowered for the Following Purposes

Each organized county within the state shall be a body corporate and politic and as such shall be empowered for the following purposes:

1. To sue and be sued;

2. To purchase and hold real and personal estate for the use of the county, and lands sold for taxes as provided by law;

3. To sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interests of the inhabitants;

4. To execute leases of real property owned by the county to nonprofit corporations organized for the general purpose of historical preservation;

5. To make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of corporate or administrative power; and

6. To exercise such other and further powers as may be especially provided for by law.

---

19 Oklahoma Statutes §734

Contracts to Acquire Sites, Purchase, Erect, Repair, Remodel, Equip or Furnish – Bonds – Elections

Whenever the board of county commissioners of any county considers it to be to the best interest of the county to acquire sites, purchase, erect, repair, remodel, equip and furnish a courthouse or jail, they shall have power to contract for the acquisition of sites, purchase, erection, repair, remodeling, equipping and furnishing of same and to issue bonds in payment therefor. . . .

APPENDIX B

Defendant's Exhibit 330

OG&E ELECTRIC SERVICES SHEET NO. 65.0
P.O. Box 321 DATE ISSUED 6-12-96
Oklahoma City, Oklahoma 73101

STANDARD PRICING SCHEDULE: DAP
STATE OF OKLAHOMA
DAY-AHEAD PRICING Code No. 20

Service Territory

Service under this tariff is available in all territories served by OG&E Electric Services (Company), which are within the Oklahoma Corporation Commission's (Commission) jurisdiction.

Availability

This tariff is available to customers who are selected by the Company to participate in the Company's Day-Ahead Pricing (DAP) program and who execute a written contract for such service, including customers taking service under the Company's Rider for Load Curtailment (Curtailment Customers).

This tariff is offered as part of a pilot program, and the pilot program is scheduled for a minimum of two years, with individual customer participation in the pilot program not to exceed four years.

The Company's Rules, Regulations, and Conditions of Service and the Commission's Rules and Regulations apply to service provided under this tariff. This tariff is not available for resale, stand-by, breakdown, or auxiliary service.

Service Type

The Company will provide single or three phase service delivered at approximately 60 hertz. The Company shall determine the appropriate voltage(s) for delivery to the customers' premises.

Service Termination

A customer may cancel service under this tariff and return to another tariff schedule upon giving 30 days written notice. If the thirtieth day of the notice period does not fall on the last day of the billing month, service will continue under this schedule through the next billing period. A customer may return to another tariff schedule without penalty, and with the same billing determinants (including elapsed time on the billing demand ratchet) which existed prior to taking service under this tariff. Consumption under this tariff will not affect a customer's billing determinants for other tariff schedules.

If a customer terminates service under this tariff, the customer will not be eligible to receive service under this tariff until the greater of: (1) two years from termination date or (2) the start of the permanent program.

Bill and Hourly Pricing Methodology

The customer's bill under this tariff will consist of two parts: (1) the Standard Bill component and (2) the hourly Price component. The Standard Bill component will be determined by multiplying the Customer's Base

Line (CBL) billing determinants by the customer's standard tariff rate(s). The hourly Price component will be the sum over all hours of the difference between each hour's actual kilowatt-hour use and the CBL kilowatt-hour use multiplied by the respective hourly Day-Ahead Price. The hourly Day-Ahead Prices will be based on the Company's projections of hourly incremental operating, outage, generation, transmission, and distribution costs, including provisions for losses by service level and a Risk and Recovery Factor.

Load Curtailment

For Curtailment Customers, during curtailments, use above the Contracted Demand will be billed at an hourly price that reflects the market price for Emergency Power and Energy (adjusted for line losses plus 6 mills per kilowatt-hour), if such power and energy are available.

If Emergency Power and Energy are unavailable during curtailment periods, the Company shall notify Curtailment Customers that they must reduce consumption to their Contracted Demand. If a Curtailment Customer fails to reduce consumption to the Contracted Demand when notified of such a requirement, the Curtailment Customer may be denied further service under this tariff and the Rider for Load Curtailment.

Pricing Periods

Each hour is a pricing period, and the corresponding quoted hourly price is applicable to all kilowatt-hours taken during that hour. The daily pricing periods for DAP

begin with the hour-ending 0100 and end with the hour-ending 2400.

Price Notice

By a method specified by the Company and by 4:00 p.m. each day (Monday through Friday), the Company will make available to Day-Ahead Pricing customers the hourly prices which shall be effective for the following day. The customer will be responsible for obtaining the necessary equipment to receive Day-Ahead Prices (e.g. telephone, modem, telecopier, or computer). Except during high-risk-outage periods, the Company will make prices available for Saturday through Monday on the previous Friday. More than day-ahead pricing may also be used for the following holidays: New Years Day, Martin Luther King Day, Presidents Day, Memorial Day, Fourth of July, Labor Day, Veterans' Day, Thanksgiving (Thursday and Friday), and Christmas (including Christmas Eve Day). Under high-outage-risk circumstances, the Company may not be able to project prices more than one day in advance, and the Company reserves the right to update prices on a one-day-ahead basis. If, on certain occasions, a customer is unable to receive the Day-Ahead Prices in the manner specified by the Company, the customer shall inform the Company so that prices may be provided.

Curtailment Notice

The Company will provide curtailment notices to Curtailment Customers at least 30 minutes before curtailments will begin. At the time the Company provides the curtailment notice, the Company will also notify Curtailment Customers if Emergency Power and Energy are available and the hourly prices that will be effective during the curtailment period for incremental or decremental use from the Contracted Demand.

Price Reduction Subsequent to Price Notification

Subsequent to providing hourly prices by 4:00 p.m. of the day before the prices are effective, the Company may decrease its Day-Ahead Prices. The Company shall notify customers of such change in prices as soon as is practicable.

Confidentiality

Any customer taking service under this tariff shall not disclose to any person, entity, or organization any information regarding the pricing, including, but not limited to, the hourly prices offered under this tariff, without the prior written consent of the Company. Disclosure of such information, including failure to obtain prior written consent before providing such information to Consultant(s) (individuals or entities providing energy use and purchase analysis assistance to the customer) shall result in a material breach of any agreement between such customer and the Company, for which the Company shall

be entitled to recover at law and at equity. Such disclosure shall at the Company's sole option, result in suspension of service under this tariff, with a full reimbursement to the Company by the customer of the difference between the applicable standard tariff rates and the rate(s) provided pursuant to this tariff for all use billed pursuant to this tariff.

Customer Baseline Load

For existing customers, the Customer Baseline Load (CBL) shall be 12 consecutive months of customer-specific, historic, hourly load information. For new customers, the CBL shall be 12 consecutive months of hourly load information which best represents a customer's typical or expected electricity consumption level and pattern. Acceptance of the CBL is a precondition for eligibility for this tariff.

For Curtailment Customers, during curtailment hours, the CBL will be the Curtailment Customer's Contracted Demand, which shall be the Contracted Demand agreed to under the Rider for Load Curtailment.

Standard Bill

The Standard Bill is calculated by applying the appropriate non-Day-Ahead Pricing tariff and the Fuel Cost Adjustment (FCA) charge to a customer's CBL billing determinants for each month of the year (exclusive of taxes and franchise fees). If base rates or the FCA are subsequently revised, those changes will be reflected in

the customer's Standard Bill based on their CBL billing determinants for a given month.

As required by the Company's Terms and Conditions of Service, customers taking service under this tariff may be required to make a one time contribution or pay a monthly facilities charge sufficient to cover the cost of transmission and distribution facilities provided by the Company to accommodate the customer's load.

Bill Determination

A bill under this tariff is rendered after each monthly billing period and consists of a Standard Bill amount and a charge (or credit) for incremental (or decremental) energy use based on the difference between a customer's actual use and the customer's CBL in each hour multiplied by the respective hourly energy price provided during the billing period. The monthly bill under this tariff is calculated using the following formula:

$$\text{DAP Bill}_{Mo} = \text{Standard Bill}_{Mo} + \Sigma\,[\text{Price}_{Hr} \times (\text{Load}_{Hr} - \text{CBL}_{Hr})] + \text{Administrative Charge}$$

Where:

DAP Bill_{Mo} = Customer's bill for service under this option in a specific billing month

$\text{Standard Bill}_{Mo}$ = Customer's bill for a specific month on use as defined by the CBL and billed under the standard tariff inclusive of Fuel Cost Adjustment and exclusive of franchise fees and taxes

Σ = Sum over all hours of the monthly billing period

$Load_{Hr}$ = Customer's actual kilowatt-hours use in an hour

CBL_{Hr} = Customer Baseline Load in an hour

$Price_{Hr}$ = Hourly DAP price based on the Company's Hourly marginal or incremental costs and standard tariff prices. $Price_{Hr}$ shall never be less than $.015 per kilowatt-hour:

$[(RRF \times MC_{Hr}) \times LAF] + [(1 - RRF) \times STD_{Price}]$

Where:

MC_{Hr} = the marginal operating, generation, transmission, distribution costs for the hour

*For Curtailment Customers, during curtailment periods, for use above the Contracted Demand when Emergency Power and Energy are available, the Marginal Cost will reflect the current market price for Emergency Power and Energy, as adjusted.

RRF = The Risk and Recovery Factor (between .5 and 1)

LAF = Loss Adjustment Factor for the appropriate Service Level:

Level 1	1.02315
Level 2	1.02726
Level 3	1.03499
Level 4	1.04150
Level 5	1.05320

STD_{Price} = Average pricing for each pricing period under the standard tariff

Fuel Cost Adjustment

Hourly kilowatt-hour use above the hourly CBL kilowatt-hour use shall not be subject to the Rider for Fuel Cost Adjustment.

Administrative Charge

To cover the billing, administrative, and communication costs associated with this service, an Administrative Charge of either $200 or $275 per month will be charged. Customers who choose the $275 per month Administrative Charge will receive a loaned personal computer, printer, and modem for receiving Day-Ahead Prices.

Meter Communication Link Requirement

For meter reading, the Company requires the use of a telephone line or other communication link deemed acceptable by the Company. The customer must provide the line as well as Company access to the line.

Power Factor Clause

In applying the standard tariff Power Factor Clause for the Standard Bill portion of the monthly bill calculation, the Average Power Factor will be based on *total* monthly consumption. The customer's standard tariff Power Factor Clause provisions will apply in all other respects.

Franchise Payment

The above stated rates do not include any amount for franchise payments levied upon the Company by a municipality. When a municipality, by a franchise or other ordinance, levies or imposes upon the Company franchise payments or fees (based on a percent of gross revenues) to be paid by the Company to the municipality, such franchise payment will be added as a percentage of charges for electric service to the bills of all customers receiving service from the Company within the corporate limits of the municipality exacting said payment.

Annual Public Utility Assessment Fee

The Standard Bill calculation will include a charge levied pursuant to the Rider for Annual Public Utility Assessment Fee.

Late Payment Charge

A late payment charge in an amount equal to 1.5 percent of the total balance for services and charges remaining unpaid on the due date stated on the bill shall be added to the amount due. The due date as stated on the bill shall be 20 days after the bill is mailed.

Effective 28 June 1996

Rates Authorized

By	402103	960000005	24 May 1996
	(Order No.)	(Cause/Docket No.)	(Date of Order)

APPENDIX C

Defendant's Exhibit 318

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR APPROVAL OF DAY-AHEAD AND WEEK-AHEAD PRICING TARIFFS	)))))))	CAUSE NO. PUD 960000005 ORDER NO. 402103

Hearing: April 4, 1996, before Robert E. Goldfield, Administrative Law Judge

Appearances: Diane Goldschmidt and F. D. Binns, Jr., Attorneys for Oklahoma Gas and Electric Company;

Rick D. Chamberlain and Mickey S. Moon, Assistant Attorneys General, Attorneys for the Office of the Attorney General of the State of Oklahoma; and

Jacqueline T. Miller, Assistant General Counsel, Public Utility Division of the Oklahoma Corporation Commission.

FINAL ORDER

BY THE COMMISSION:

The Oklahoma Corporation Commission of the State of Oklahoma being regularly in session and the undersigned Commissioners being present and participating,

there comes on for consideration and action, the above Cause for an order by the Commission.

SUMMARY OF EVIDENCE

Testimony of William L. Wylie Manager of the Costing and Pricing Department of Oklahoma Gas and Electric Company was prefiled and adopted by the witness, Mr. Wylie. Mr. Wylie explained real time pricing and why OG&E needed to implement it, which includes, among other things, customers' requests for the service and introduction of marginal pricing techniques into the market place and the fact that it is a load management tool. Mr. Wylie described the methods used in the components of the bill and the format which includes a Day-Ahead as well as Week-Ahead pricing tariff; and that the tariff is a pilot program and by its term contained certain time limitations. He described the "bill on hourly pricing methodology"; the "price notice" provisions of the tariff; and the customer confidentiality clause. Mr. Wylie discussed the application of the fuel adjustment clause under the tariff and the administrative charge proposed. That OG&E proposed both Day-Ahead and Week-Ahead tariffs in order to provide customer choice and recognition by customers of varying prices of electricity. An explanation was provided by Mr. Wylie as to the pricing provisions and Mr. Wylie requested that the Day-Ahead pricing tariff, and Week-Ahead pricing tariff be approved and that modification to the rider for fuel cost adjustments be likewise approved.

David W. Brammer, Tariff and Cost of Service Coordinator for the Oklahoma Corporation Commission Public Utilities Division, prefiled testimony in this cause, which testimony was adopted by Mr. Brammer. Mr. Brammer testified concerning the Day-Ahead pricing and how it would be used; the fact that a customer could reduce energy costs and that economic benefits would result to the customer as well as benefits to OG&E to encourage load growth at the proper time. Mr. Brammer further testified that the Commission has approved a pilot program very much like the one being considered here in Public Service Company of Oklahoma's real time pricing tariff application, Cause PUD940000301, Order No. 382997, dated April 28, 1994. Mr. Brammer described the elements of the proposed Day-Ahead pricing and Week-Ahead pricing by OG&E and that staff did not oppose adoption of the Day-Ahead and Week-Ahead pricing tariffs as filed. Mr. Brammer additionally testified that this tariff may be amended by agreement of the parties or through a hearing upon proper notice by any party to the cause.

Additionally Mr. Brammer testified that certain reporting requirements should be imposed upon OG&E which include:

1. Each participating Day-Ahead and Week-Ahead customer's historical consumption and the monthly CBL;

2. Each participating customers usage while participating in the program;

3. Forecast hourly energy price versus actual energy price;

4. Actual monthly usage of non-participating customers identified by customer class;

5. Calculations and methodologies utilized by OG&E to calculate the hourly energy prices at randomly selected intervals; and

6. Copies of any OG&E analysis o! the Day-Ahead and Week-Ahead Pricing program.

After taking into account the testimony of the witnesses and reviewing the Application with attachments filed by Oklahoma Gas and Electric Company, the Corporation Commission of Oklahoma finds that the Day-Ahead and Week-Ahead Pricing Tariffs should be approved.

FINDINGS

The Commission finds that it has jurisdiction over this matter by virtue of Article IX, § 18 of the Oklahoma Constitution, Title 17 Oklahoma Statutes § 151 et seq., as well as OAC 165:35 et seq., known as the General Rules and Regulations Governing Electric Utilities.

The Commission further finds that due and proper notice has been given for the hearing of this Application. On January 3, 1996, Oklahoma Gas and Electric Company ("OG&E") requested approval of Day-Ahead Pricing and Week-Ahead Pricing tariffs as part of a pilot program to (1) provide customers with price signals which will result in more efficient use of generation resources, and (2) gauge its customers' responsiveness to hourly pricing to the economic benefit of both parties. Enrollment in OG&E's pilot program is scheduled to last for two years, with individual participation in the pilot program not to

exceed four years. That the tariffs are a part of an experimental program and the provisions of OAC 165:35-19-2 and OAC 165:35-5-1(a) and (c) shall not apply to those tariffs. Copies of the proposed tariffs were attached to the Application. On April 4, 1996, a hearing was held before the Administrative Law Judge in which OG&E requested approval of the Day-Ahead and Week-Ahead Pricing Tariffs.

The Commission further finds that the proposed Day-Ahead and Week-Ahead Pricing Tariffs will not result in unjust or undue discrimination.

The commission further finds that a modification of the rider for fuel cost adjustment should be as follows: Hourly kilowatt-hour use above the hourly CBL kilowatt-hour use shall not be subject to the Rider for Fuel Cost Adjustment. In all other respects, the fuel adjustment clause approved by Order No. 380443 in Cause No. PUD001055 shall continue as set forth in the Order.

The Commission further finds that the Day-Ahead and Week-Ahead Pricing Tariffs should be and are hereby approved, incorporating the recommendations of the Administrative Law Judge herein.

ORDER

The Commission orders that the Day-Ahead and Week-Ahead Pricing Tariffs are part of a pilot program, and that the provisions of OAC 165:35-19-2 and OAC 165:35-5-1(a) and (c) are hereby waived to the Day-Ahead and Week-Ahead tariffs.

It is further ordered that Oklahoma Gas and Electric Company shall provide the information and reporting requirements to the Public Utilities Division, as set forth herein. That the information and reporting requirements shall be subject to Order No. 399010, Cause No. PUD 960000005, dated January 29, 1996.

It is further ordered that the fuel adjustment clause approved by Order No. 380443 in Cause No. PUD001055 shall continue as set forth in that Order, except same shall be modified as follows:

Hourly kilowatt-hour use above the hourly CBL kilowatt-hour use shall not be subject to the Rider for Feel Cost Adjustment.

It is further ordered that the Day-Ahead and Week Ahead Pricing Tariffs shall be effective upon approval by the Director of Public Utilities; it is further ordered that any future revisions to the tariff which the parties to this cause may agree upon may become effective after approval by the Director of Public Utilities as set forth in Mr. Brammer's testimony on page three (3) of this Order.

IT IS THEREFORE THE ORDER OF THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA that the Day-Ahead and Week-Ahead Pricing Tariffs are hereby approved.

CORPORATION COMMISSION OF OKLAHOMA

/s/ Cody L. Graves
CODY L. GRAVES, Chairman

/s/ Bob Anthony
BOB ANTHONY, Vice Chairman

/s/ Ed Apple
ED APPLE, Commissioner

DONE AND PERFORMED this 24 day of May, 1996.

BY THE ORDER OF THE COMMISSION:

/s/ Charlotte W. Flanagan
CHARLOTTE W. FLANAGAN, Secretary

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The foregoing findings and Order are the Report and Recommendations of the Administrative Law Judge.

/s/ Robert E. Goldfield
Robert E. Goldfield
Administrative Law Judge

May 23, 1996
Date

APPENDIX D

Plaintiff's Exhibit 164

Randy Warren
1/26/93

TRIGEN
A Plan of Action

To remove customers from Trigen:

* Continue to work on educating our customers about the inefficiencies of Trigen.

* Continue to work on creative ideas such as guarantees, loans, and lease/purchases, benefiting both OG&E and our customers.

* Establish a good rapport with a few select mechanical engineers keeping these engineers educated on the way Trigen does business.

* Prepare a rate comparison between existing Trigen customers. This will let our customers see how their rates compare with others.

* Schedule occasional breakfast meetings with existing Trigen customers.

* Invite former customers/engineers from Tulsa to explain why Trigen was discontinued.

* Keep existing Trigen customers apprised as to when their contracts expire.

* Have the Legal Department review contracts, for possible way out.

* Develop and organize a file of all Trigen customers complete with Trigen's contract and some of the billings.

* Meet on regular basis with commercial marketing group to discuss new and innovative ways to help our customers switch to electric chillers.

How do we retain existing customers:

* Continue to educate customers about Trigen.
* Get cooling facilities upgraded as they get old, this will create an exit barrier.
* Continue a good working relationship with these customers.
* Develop creative financing ideas to help customer attain new equipment. Ideas such as guarantees, loans, lease/purchases.

(3)

No. 01-178

Supreme Court, U.S.
FILED
SEP 28 2001
CLERK

In The

Supreme Court of the United States

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Petitioner,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* UNITED STATES COMBINED HEAT AND POWER ASSOCIATION, AMERICAN GAS COOLING CENTER, INTERNATIONAL DISTRICT ENERGY ASSOCIATION, AND DISTRIBUTED POWER COALITION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN W. JIMISON
ROGER A. BERLINER
MEGAN M. GRANT
Counsel of Record
BERLINER, CANDON & JIMISON
A Professional Corporation
1225 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 955-6067

Attorneys for Amici United States Combined Heat and Power Association, American Gas Cooling Center, International District Energy Association, Distributed Power Coalition of America

September 28, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 2

I. THIS CASE PRESENTS AN ISSUE CRITICAL TO THE NATIONAL POLICY INTEREST IN COMPETITIVE ENERGY MARKETS 3

II. THE SCOPE OF THE STATE ACTION DOCTRINE MUST BE CLARIFIED 12

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

A.D. Bedell Wholesale Company, Inc., et al. v. Philip Morris Inc., et al., 2001 WL 708447 (3d Cir. June 19, 2001) 16

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) ..... passim

Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976) 13, 14

FTC v. Ticor Title Ins. Co., 504 U.S. 621, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992) ..... passim

Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988) ..... passim

Snake River Valley Electric Association v. Pacificorp, 238 F.3d 1189 (10th Cir. 2001) 15, 16

Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Electric Co., 244 F.3d 1220 (10th Cir. 2001) 14

OTHER AUTHORITIES

Report of the National Energy Policy Development Group, *National Energy Policy*, May 2001, Government Printing Office, Washington, D.C. 10

INTEREST OF *AMICI CURIAE*

Amici curiae United States Combined Heat and Power Association (USCHPA), American Gas Cooling Center (AGCC), International District Energy Association (IDEA), and Distributed Power Coalition of America (DPCA) (collectively, the Associations) are nonprofit trade associations sharing a common interest in the ongoing development of more competitive markets for energy services in the United States.[1] Their members participate actively in such markets as manufacturers of equipment, developers of energy services and projects, or major consumers of energy services meeting improved economics. This case could impede the continued ongrowth of such markets, as it could affect the extent to which the state action immunity doctrine can be used to immunize anticompetitive actions of a regulated utility participating in such markets outside the explicitly defined boundaries of its monopoly and outside the supervisory purview of state regulators. Its resolution will affect many more active participants in U.S. energy markets than merely Trigen-Oklahoma City Energy Corporation (Trigen) and Oklahoma Gas & Electric Company (OG&E), the sole petitioner and sole respondent in this proceeding.

---

[1] The Associations submit this brief with the consent of the parties. Both Trigen-Oklahoma City Energy Corporation and Oklahoma Gas & Electric Company have filed letters providing a blanket consent to the filing of briefs amicus curiae with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, amici curiae state that this brief in its entirety was authored by amici curiae and their counsel. No monetary contributions were made for the preparation or submission of this brief by any person other than amici curiae, their members or their counsel.

STATEMENT OF THE CASE

Amici adopt the statement of the case in Petitioner's brief.

REASONS FOR GRANTING THE WRIT

Summary of the Argument

In the energy sector, as earlier in transportation and communications, markets that have traditionally been regulated are evolving into competitive markets. Utility companies that have traditionally served franchise markets through local monopolies increasingly offer their products in competitive markets for energy services that are not regulated. As these evolutions have occurred, the lines of the state action immunity doctrine as it was originally applied have begun to blur. This case presents a ripe example of the resulting inadequacy of existing law when a regulated energy utility seeks to shield itself from antitrust liability for anticompetitive actions in a market where its product competes with other energy products to provide energy services, and the state regulates neither the market nor the utility's particular actions.

Amici curiae Associations argue that this evolution of markets and the public policy that favors it will be frustrated if state action immunity is extended, as it would be

by the Tenth Circuit in the decision below, from the regulated market for an energy product, in this case electricity, into unregulated markets where that product is but one competing form of energy to provide energy services, in this case cooling services for buildings.

Amici further argue that, even assuming that OG&E were not operating outside the bounds of a market in which OG&E was authorized to maintain a monopoly, the Tenth Circuit wholly failed to consider the adequacy of the state's supervision of OG&E's anticompetitive actions. The Court should grant the writ and review this case in order to clarify the appropriate degree of state supervision of monopolistic activity required to exempt monopoly under the state action doctrine, resolving a variety of interpretations among the Circuit courts of which the Tenth Circuit Court decision is an extreme example.

I. THIS CASE PRESENTS AN ISSUE CRITICAL TO THE NATIONAL POLICY INTEREST IN COMPETITIVE ENERGY MARKETS

As the general economic trend toward reducing regulation and bringing competitive market forces to bear in the U.S. economy sweeps across the energy industries (as it has previously swept across the telecommunications and transportation industries), new energy market entrants, including many of the members of the Associations joined as *amici curiae* in this brief, seek to compete to provide energy products and services. In so doing, they frequently compete with entities that once had a legal monopoly in portions of those markets that have become

competitive, and may still have legal monopolies in other portions of those markets.

Amici curiae believe that it is critical that the bounds of antitrust immunity for regulated monopolies coincide precisely with the bounds of the remaining regulated monopoly portions of those markets. It is equally critical that potentially anticompetitive behavior be disciplined within those bounds by conscious and effective state supervision. This Court has long recognized the importance of these two factors in prior cases by making them the two prongs of the "state action immunity doctrine," exempting regulated utilities from antitrust liability for anticompetitive actions only if they were taken within the defined regulated sphere and under meaningful state supervision. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). It is time to reinforce and clarify the limitations on the scope of antitrust immunity conferred upon a regulated energy utility where its energy product is sold in unregulated competition with other energy products that can meet the same energy need, and when the state neither regulates the market for those energy services nor supervises the utility's actions in that market.

USCHPA, AGCC, IDEA, and DPCA, as *amici curiae*, bring a broad, industry-wide perspective to this issue:

- *Amicus* United States Combined Heat and Power Association represents for-profit and non-profit entities who support and promote the proliferation of highly-efficient, environmentally-beneficial combined heat and power technologies. By capturing and utilizing (for steam, heating, cooling, air treatment, or other

purposes) the thermal energy of a combustion process also used in the generation of electricity, CHP projects achieve energy efficiencies of two to three times the efficiencies of conventional power generation. At the same time and by the same means, they reduce emissions to half or less of the emissions produced when fuel is consumed separately for these purposes. The success of CHP projects requires markets for energy services in which customers can recognize and elect the high energy and environmental efficiency of CHP in fair competition with separate electricity and thermal energy services, including products that may be marketed by regulated utilities.

- *Amicus* American Gas Cooling Center promotes the development, demonstration, and implementation of high-efficiency distributed technologies for cooling, including combinations of cooling with heating and other energy services. Members of AGCC include natural gas distribution companies, municipal utility consortia, pipelines, producers, associated equipment manufacturers, government agencies, nonprofit organizations, and universities. The AGCC and its members act as a catalyst to promote natural gas cooling equipment, heating/cooling systems, and dehumidification technologies. The success of such systems depends on the existence of markets in which they can readily be installed, interconnected, and utilized, potentially in competition with cooling technologies that would consume electricity provided by regulated utilities.

- *Amicus* International District Energy Association fosters the success of its members as leaders in providing reliable, economical, efficient and environmentally sound district energy services. Its vision is to advance global environmental quality through efficient district energy. The Association's membership of about 900

members worldwide, including 850 in the United States, consists of representatives from utilities, municipals, universities, hospitals, military bases, airports, industrial parks, and other physical plant systems engaged in the supplying of thermal energy in the form of steam, and hot and chilled water for heating, cooling and process uses. The success of district energy systems requires a market in which the efficiency and cleanliness of district energy can compete fairly with the provision of steam, heating or cooling through separate appliances using electricity or fuels, including those provided by regulated utilities.

- *Amicus* Distributed Power Coalition of America was created to facilitate and advocate the optimal use of distributed power for the placement of electric power generation at the point of need. Members of DPCA include utilities, end users, power equipment manufacturers, pipelines, electric and gas marketers, and research organizations. The success of distributed power applications requires markets for energy services in which such applications can compete fairly with centralized electricity generation delivered through transmission and distribution wires, which generally remain regulated as monopoly utility systems.

Each of the Associations joined in this brief therefore seeks markets for energy services that are open to the competitive efforts of their members, and are potentially competing among themselves as well as with others. This potential competition includes both members and non-members of the Associations who retain regulated monopoly status in one or more specific energy products such as electricity or natural gas service.

The Associations submit that the Court should grant the writ sought by petitioner because of the profoundly negative effect on national policies promoting competitive energy markets if the lower court decision is allowed to stand unreviewed. If anticompetitive acts can be committed with impunity outside the defined monopoly market by the protected utility, or can be committed without the assurance that they are closely reviewed for consistency with the public interest, competitive entrants will be deterred and the benefits of competition will not be fully realized. As a result, this case presents an issue of critical importance to the competitive strength of the national market for energy services.

Amici curiae believe that it is critical to recognize that the relevant market in this case, and the relevant energy markets for national policy purposes, are markets for energy services, rather than markets for energy itself. Consumers do not purchase energy for its own sake, but instead to have the services that require energy: heat, light, cooling, dehumidification, transportation, products from industrial processes, etc. In many instances, different forms of energy can compete to provide the same energy service. Heating can be provided to buildings, for example, in many ways: electric resistance heating, electric heat pump, oil furnaces, natural gas furnaces, hot water delivered through a district energy system, hot water from a solar system, firewood in fireplaces or wood stoves, or coal furnaces, among others. The market for providing heat to buildings is therefore potentially a highly competitive market. It is critical that no one entrant or group of entrants has the power to commit anticompetitive actions in seeking to win that market

shielded by immunity from antitrust liability drawn from the regulated monopoly granted over its production or delivery of one of the competing forms of energy capable of serving that market.[2]

In this case, it is clear that Trigen was not competing in the electricity market (although the record below suggests that OG&E was motivated to oppose Trigen in part out of fear that Trigen would, when the law allowed, compete directly in the electricity market).[3] It is also clear that OG&E recognized that it was competing with Trigen, but OG&E was not competing in the market for chilled water. Instead, both were competing in the market for building cooling services, a market in which other forms of energy (natural gas cooling, for example) could also potentially compete. Indeed, this is what the jury found in this case to be the relevant market: the market for cooling services. It is unquestionable that the State of Oklahoma did not seek to regulate the market for cooling services in buildings, and that Trigen did not become a regulated utility in seeking to serve this market by delivering chilled water through its pipes. Neither did the State provide nor intend that its electric utilities take actions to make electricity the exclusive form of providing cooling services or otherwise monopolize the cooling

---

[2] The Associations do not argue that regulated utilities should be excluded from such competition, nor that they be barred from competing through price offers reflecting regulated rates. Rather, they should simply not be protected from antitrust liability for non-price anticompetitive actions taken to extend their monopolies from the regulated markets into unregulated markets.

[3] 10th Cir. App. vol. VI at 1182-89.

services market. Therefore, OG&E was clearly participating in an unregulated and competitive market in its efforts to win market share in promoting cooling services that required electricity and endeavoring to defeat competitors-offering cooling services in other manners. The critical question is whether OG&E's antitrust immunity derived from its status as a regulated monopoly for the delivery and retail sale of electricity should extend to immunize the blatantly anticompetitive actions the jury found it had committed in the competitive market for cooling services. The answer will determine the competitive rules and therefore the potential to obtain competitive benefits in every market for energy services across the United States, including the markets in which the members of the Associations *amici curiae* operate.

The importance of carefully defining the limitations of antitrust immunity afforded to a regulated energy utility operating outside its monopoly market is increasing. This is because national and state policies are increasing the role of competitive market forces, and diminishing the role of command-and-control regulation, in markets for energy services. To date the federal government and numerous states have enacted laws to restructure the energy industries to "unbundle" their markets into competitive and monopoly sub-markets. The report of the President's National Energy Policy Development Group, "National Energy Policy," stated in May 2001, when announcing the Administration's energy policy priorities:

> The electricity industry is going through a period of dramatic change. To provide ample electricity supplies at reasonable prices, states

> are opening their retail markets to competition. This is the most recent step in a long transition from reliance on regulation to reliance on competitive forces. This transition from regulation to competition began in 1978 with enactment of the Public Utility Regulatory Policies Act [cite omitted], which promoted independent electricity generation. Open-access transmission policies adopted by the Federal Energy Regulatory Commission (FERC) in the late 1980s further promoted competition in wholesale power markets. Congress largely ratified these policies with enactment of the Energy Policy Act of 1992 [cite omitted], which further promoted non-utility generation. FERC took another large step to promote competition with its open-access rule in 1996, which provided greater access to the transmission grid, the highway for interstate commerce in electricity. Increased competition in wholesale power markets encourages states to open retail electricity markets. . . . Beginning in 1996, states began opening their retail markets to competition in order to lower electricity prices. Twenty-five states have opted to open their retail electricity markets to competition.[4]

As markets formerly served by fully-integrated utility monopolies are partially or completely restructured to allow competitive market forces to create choices and lower costs for consumers, it is critical to *amici curiae* and their members that competition itself be protected by even-handed application of the antitrust laws. Granting a

---

[4] Report of the National Energy Policy Development Group, *National Energy Policy*, May 2001. Government Printing Office, Washington, D.C. page 5-11 (Chapter 5, page 11).

utility antitrust immunity for its anticompetitive actions in any market in which its regulated product is sold competitively with another form of energy is incompatible with a policy of allowing, indeed encouraging, competition in energy services markets.

If these markets are to function properly, competitors to provide energy services must be assured the law will constrain regulated entities to the use of their monopoly privileges solely within their remaining and explicitly regulated monopoly markets. Close supervision within those markets of monopolistic actions is also necessary to assure they are not contrary to the public interest. To the extent regulated utilities elect to participate in competitive energy services markets, like the market for cooling services in which the Petitioner and Respondent were competing in this case, they must be obliged to compete fairly. They should not be exempted from antitrust liability for anticompetitive actions they commit in the competitive segments of the market on the basis of their continuing status as regulated monopolies with regard to one or more non-competitive functions.

The decision below wrongly extends the state action immunity doctrine beyond any exception this court has carved out. Immunity from antitrust liability granted because the defendant is a regulated monopoly has repeatedly been held by this Court to be limited to extend no further than the monopoly itself extends, and even within that extent requires that the anticompetitive actions be closely supervised by the state in an ongoing, conscious, and effective manner. If allowed to stand, the decision below will affect not just Trigen and OG&E, but

all participants in the energy services industries, including developers of industrial combined heat and power systems, building cooling, heating and power systems, district energy systems for heating, cooling, and power, and other distributed energy resources. As major trade associations representing many such entities, *amici curiae* call on the Court to review the decision of the Tenth Circuit in this case as a matter of critical priority to national policy favoring competition where feasible in energy markets.

II. THE SCOPE OF THE STATE ACTION DOCTRINE MUST BE CLARIFIED

It has been almost ten years since this Court last addressed the scope of the state action doctrine. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). Since then, there has been a sweeping transformation in the fundamental relationship between state regulated entities and private entrepreneurs in the competition for the provision of energy services. Today, it is increasingly the rule, rather than the exception, that private entrepreneurs are in a position to provide what were once regulated utility services to energy service consumers across the nation.

As set forth more fully in the policy discussion above, this tectonic shift in the competitive landscape makes it imperative that the rules of the game, and the rule of law, be understood by all those who influence the balance of competition, including reviewing courts. As the Tenth Circuit decision at issue underscores, that is

clearly not the case today with respect to the core question of the extent to which a regulated utility's conduct is insulated from federal antitrust scrutiny.

The Tenth Circuit found that state action immunity applies to OG&E because it met the *Midcal* two-pronged test: clearly articulated policy and active supervision. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). As Trigen has forcefully argued, and as *amici curiae* have noted above, the Tenth Circuit has mistakenly identified the relevant market, the market for cooling services, instead accepting that OG&E's anticompetitive actions were wholly within the electricity market in which it has a legal monopoly by effect of law. Oklahoma does not have a clearly articulated policy governing the cooling services market, and the Oklahoma Corporations Commission (OCC) does not regulate the cooling services market. *Amici curiae* submit that the lack of any State action creating a regulatory regime to apply to the cooling services market is sufficient to deny OG&E state action immunity for its anticompetitive actions in that market.

As Trigen notes, this Court previously visited this issue in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). In *Cantor*, this Court considered whether a regulated utility's lightbulb distribution program was entitled to immunity from antitrust claims under the state action doctrine. This Court held that the program distributing free light bulbs was not immune from the Sherman Act, and recognized that,

> [t]here is no log
> requiring such a f
> insofar as it is ex
> powers and also
> dards to the exte
> activity in compe

Id. 428 U.S. at 596, 96
has moved into a co
cooling services, and
it enjoys while exercis
the regulated electrici

Even if the Cou
actions were within
aside for OG&E's mo
there is no suggestion
in meaningful super
actions. It is on the
assessment of the sec
amici curiae focus, to e
clarify the state supe

The Tenth Circuit
Midcal test, the requi
satisfied solely by v
regulated utility. T
regarding the extent
challenged conduct i
that OG&E was regu
Tenth Circuit. *Trigen-Oklahoma Gas & Electric Co.*, 244 F.3d 1220, 1226 (10th Cir. 2001).

While invoking t
cuit's approach to the

S.Ct. at 3120. Like *Cantor*, OG&E
mpetitive area of the economy of
annot rely on the immunity status
ing its natural monopoly powers in
ty market.

t were to conclude that OG&E's
the market realm deliberately set
nopoly to be exercised, however,
by the Court that the state engaged
vision of OG&E's anticompetitive
weakness of the Tenth Circuit's
cond prong of the *Midcal* test that
mphasize to this Court the need to
rvision requirements.

found that the second prong of the
rement for active supervision, was
irtue of the fact that OG&E is a
here was no analysis conducted
of that supervision, or whether the
tself was supervised. The mere fact
ulated by the OCC sufficed for the
Oklahoma City Energy Corp. v. Okla-

the mantra of *Midcal*, the Tenth Cir-
second prong is so far to one end of

the active supervisory spectrum as to render it virtually meaningless. It is also completely inconsistent with the more reasoned analysis employed by the Ninth and Third Circuits, both of which have concluded that the specific conduct at issue must be actively supervised by the state in order to be immunized by the state action doctrine.

In *Snake River Valley Electric Association v. Pacificorp*, 238 F.3d 1189 (9th Cir. 2001), the Ninth Circuit discussed and applied *Midcal*, *Patrick v. Burget*, 486 U.S. 94, 101, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), and *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). The court stated that,

> [t]he second prong of the *Midcal* test requires that the state "exercise ultimate control over the challenged [private] anticompetitive conduct." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). This prong ensures that "the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the state, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 101, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

Snake River Valley, 238 F.3d at 1193.

In considering Pacificorp's arguments that the statute in question was "self-policing" and therefore satisfied the active supervision prong, the Ninth Circuit determined that the "opt out" provision that was solely within the utility's control in effect gave the utility partial control over the no-competition policy. The Court found that this type of private regulatory power was what the active supervision prong of *Midcal* was supposed to prevent. *Id.*

at 1194. See also FTC v. Ticor Title Ins. Co., 504 U.S. at 634-35, 112 S.Ct. 2169. The Court found that the state did not actually exercise sufficient control over the specific conduct at issue to satisfy the active supervision requirement. *Snake River Valley*, 238 F.3d at 1195.

The Third Circuit has employed a similar analysis of the specific conduct at issue for purposes of applying the "problematic" second prong. In *A.D. Bedell Wholesale Company, Inc., et al. v. Philip Morris Inc., et al.*, 2001 WL 708447 (3d Cir. June 19, 2001) the court stated,

> [t]he second prong of the Midcal test is whether the resulting antitrust violation was "actively supervised" by the state. This standard is more problematic. The essential inquiry of the "actively supervised" prong is to determine if the "anticompetitive scheme is the State's own." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). Rubber stamp approval of private action does not constitute state action. A state must independently review and approve the anticompetitive behavior to satisfy this prong of the Parker doctrine. *Patrick*, 486 U.S. at 101. "The active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct." *Ticor*, 998 F.2d at 1139.

A.D. Bedell Wholesale Company, Inc., 2001 WL 708447 at *15.

The Third Circuit went on to hold that the "active supervision" prong was not satisfied, and stated "[i]t is the conduct that violates the antitrust laws that states must 'actively supervise' in order for Parker immunity to attach." *Id.* at *17.

Amici submit that the analysis employed by both the Ninth and Third Circuits, analysis that focuses on whether there was active supervision over the specific conduct at issue, is precisely what this Court intended for purposes of applying the second prong of the *Midcal* test. In *Patrick*, this Court stated that,

> [t]he active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." (Citation omitted). The requirement is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. . . . To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . The mere presence of some state involvement or monitoring does not suffice. (Citations omitted) (emphasis added).

Id., 486 U.S. at 100-101, 108 S.Ct. at 1663.

This Court went on to say,

> [t]he active supervision prong of the *Midcal* test requires that state officials have **and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy**. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Id. (Emphasis added).

In *Ticor*, this Court noted generally that "state-action immunity is disfavored, much as are repeals by implication." *Id.* 504 U.S. at 636, 112 S.Ct. at 2178 (citation omitted). This Court further stated that,

> [o]ur decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among the parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own. . . . The mere potential for state supervision is not an adequate substitute for a decision by the State. *Id.* 504 U.S. at 634-35, 638, 112 S.Ct. at 2177, 2179.

Amici respectfully submit that *Midcal*, *Patrick*, and *Ticor*, taken together, stand for the proposition that merely having power to supervise is not sufficient for the purpose of granting immunity under the state action doctrine. That power must be exercised, and it must be exercised with respect to the "particular anticompetitive acts of private parties." *Patrick*, 486 U.S. at 100-101, 108 S.Ct. at 1663.

As noted, the Tenth Circuit only found that the OCC has "general supervision" and power and authority over OG&E. There was no analysis or specific finding of active supervision over the anticompetitive acts OG&E engaged in that affected Trigen. This analysis, or lack thereof, is contrary to *amici's* interpretation of this Court's prior rulings and to the approach taken by the Ninth and Third Circuits. Indeed, if the approach of the Ninth and Third is correct, the Tenth must be in error. There is simply not room for both interpretations within the spectrum of "active supervision."

Thus, at the very least, the Tenth Circuit decision highlights the "problematic" nature of the second prong of the *Midcal* test. Given the overarching public policy considerations that are at stake, this Court should take the opportunity to clarify the extent to which the specific conduct at issue must be found to have been actively supervised by the state in order to satisfy *Midcal* and invoke the state action doctrine.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN W. JIMISON
ROGER A. BERLINER
MEGAN M. GRANT
Counsel of Record
BERLINER, CANDON & JIMISON
A Professional Corporation
1225 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 955-6067

Attorneys for Amici
United States Combined Heat and Power Association, American Gas Cooling Center, International District Energy Association, Distributed Power Coalition of America

September 28, 2001

Supreme Court, U.S.
FILED
SEP 28 2001

(4)

No. 01-178

IN THE

Supreme Court of the United States

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Petitioner,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ENERGY MARKETERS ASSOCIATION, THE ELECTRICITY CONSUMERS RESOURCE COUNCIL AND THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

WILLIAM A. MOGEL
Counsel of Record
SCOTT T. KRAGIE
JAMES P. WEHNER
SQUIRE, SANDERS & DEMPSEY L.L.P.
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-6600

Counsel for Amici Curiae

September 28, 2001

1788

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THERE IS A COMPELLING NEED TO REVIEW THE TENTH CIRCUIT DECISION EXPANDING ANTITRUST IMMUNITY AT THE VERY TIME WHEN MARKET POWER CONCERNS ARE GREATEST. 3

II. CERTIORARI IS WARRANTED TO REEXAMINE THE TENTH CIRCUIT'S UNPRECEDENTED EXPANSION OF THE STATE ACTION DOCTRINE. 8

A. The Decision Below Violates Both the Origin and Purpose of the State Action Immunity Doctrine. 8

B. The Tenth Circuit's Status-Based Holding is at Odds With the Court's Functional Approach to the Grant of Governmental Immunity to Private Parties 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Briscoe v. Lahue,
460 U.S. 325 (1983) 11

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 4

Cantor v. Detroit Edison Co.,
428 U.S. 579 (1976) ..... *passim*

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) 10

Clinton v. Jones,
520 U.S. 681 (1997) 11

Evans v. Newton,
382 U.S. 296 (1966) 12

Forrester v. White,
484 U.S. 219 (1988) 11

Hallie v. Eau Claire,
471 U.S. 34 (1985) 8

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 11

Jackson v. Metropolitan Edison Co.,
419 U.S. 345 (1974) 11, 12

National Collegiate Athletic Ass'n v. Tarkanian,
488 U.S. 179 (1988) 11

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973) 3

Parker v. Brown,
317 U.S. 341 (1943) 8

Patrick v. Burget,
486 U.S. 94 (1988) 8

Richardson v. McKnight,
521 U.S. 399 (1997) 11

Transmission Access Policy Study Group v. FERC,
225 F.3d 667 (D.C. Cir. 2000), *cert. granted sub nom Enron Power Mktg., Inc. v. FERC*,
121 S. Ct. 1185 (2001) 4, 5

Town of Concord v. Boston Edison Co.,
915 F.2d 17 (1st Cir. 1990) 3

United States v. Rochester Gas and Elec. Corp.,
4 F. Supp. 2d 172 (W.D.N.Y. 1998) 7

United States v. Topco Assocs., Inc.,
405 U.S. 596 (1972) 4

OTHER MATERIALS

Press Release, U.S. Dept. of Justice
(June 24, 1997) 6

Electricity Competition: Market Power, Mergers and Public Utility Holding Act, Statement of A. Douglas Melamed, Principal Deputy Assistant Attorney General, Antitrust Division, before the Committee on Commerce, Subcommittee on Energy and Power (May 6, 1999). 5

Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Injecting Competition into Regulated Industries and Utilities, Address before the Public Utility, Communication and Transportation Section of the American Bar Association (Apr. 20, 1995). 6

The National Energy Marketers Association, the Electricity Consumers Resource Council and the Independent Petroleum Association of America respectfully file this brief as *amici curiae* in support of Petitioner, Trigen-Oklahoma City Energy Corporation ("Trigen"). This brief is filed with the written consent of all parties.[1]

INTEREST OF AMICI CURIAE

The National Energy Marketers Association ("NEM") is a national trade association representing wholesale and retail marketers of energy and energy-related products, services, information and technologies throughout the United States. NEM's membership includes traditional energy suppliers (as well as wind and solar power), billing and metering firms, internet energy providers, energy-related software developers, risk managers, energy brokerage firms, information technology providers and suppliers of distributed generation.

The Electricity Consumers Resource Council ("ELCON") is an association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable and efficient electricity supply for all users at competitive rates. Its members have facilities in most of the fifty states, producing a wide range of products. ELCON's member companies account for approximately five percent of all the electricity consumed in the United States.

---

[1]Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their counsel and members made a monetary contribution to the preparation or submission of the brief. Petitioner is a member of NEM and ELCON.

The Independent Petroleum Association of America ("IPAA") is a national association representing approximately 8,000 independent crude oil and natural gas producers in the United States. IPAA's members produce approximately two-thirds of the natural gas consumed in the United States and drill approximately 85% of the wells in the United States.

Amici urge that this Court grant certiorari because the Tenth Circuit's decision in *OG&E* inappropriately expands the state action doctrine during a period of deregulation when there is the greatest risk of unchecked exercise of market power. The Tenth Circuit decision telegraphs to utilities that their anticompetitive conduct will be condoned under the state action doctrine even where the anticompetitive conduct is attributable to the private party rather than to state regulation.

SUMMARY OF ARGUMENT

The U.S. electric industry is on a restructuring path laid by federal and state policies mandating increased competition and encouraging the use of alternate, more efficient technologies. Confronted with such change, there is a risk that some incumbent electric utilities that have long enjoyed monopoly benefits may wish to preserve their status and exclude competitors. Accordingly, vigilant enforcement of the antitrust laws is vital at this stage of the market's evolution.

Regulated utilities enjoy "state action" immunity only insofar as they are engaged in activities that are both clearly authorized and actively supervised by the state. These dual requirements ensure that state sovereignty may be invoked to trump the antitrust laws only when the utility is engaged in conduct fairly attributed to the state. The utility in this case ("OG&E") could not have been furthering the state's interest when it monopolized the cooling services market by falsely disparaging Trigen's rates and services;

misrepresenting the benefits of electric cooling systems; and making payments to the son of a county commissioner whose vote was needed to prevent the county from extending its contract with Trigen.

The Tenth Circuit reached the conclusion that such conduct is immunized after a simplistic inquiry: does a utility sell only a regulated product? This approach converts the Court's long-standing *functional* approach to immunity into a mere test of *status*. The fact that an electric utility delivers electricity at regulated rates should be the *beginning* of the analysis of state action immunity, not the *end*.

If market power is unchecked, providers of competitive energy services and innovative technologies would be discouraged from entering even partially-regulated geographic markets; consumers would be denied the benefits of competition; and states would be denied the flexibility necessary to restructure utility regulation. Thus, there is a compelling need for review of this unprecedented decision expanding antitrust immunity in the electricity industry at the very time when market power concerns are greatest.

ARGUMENT

I. THERE IS A COMPELLING NEED TO REVIEW THE TENTH CIRCUIT DECISION EXPANDING ANTITRUST IMMUNITY AT THE VERY TIME WHEN MARKET POWER CONCERNS ARE GREATEST.

Even at the zenith of federal and state regulation, electric utilities were not *exempt* from the antitrust laws. "[S]ince our decision in *Otter Tail Power Co. v. United States*, there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976) (*citing Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)). *See also Town of Concord v. Boston*

Edison Co., 915 F.2d 17, 21 (1st Cir. 1990) ("Even though Boston Edison is a regulated firm, it has no blanket immunity from antitrust laws.") (Breyer, C.J.) (citations omitted).

Nor do utilities enjoy *immunity* when they are "engage[d] in business activity in competitive areas of the economy." *Cantor*, 428 U.S. at 596 (footnote omitted). Thus, the "'Magna Carta of free enterprise'" applies at the intersection of commercial activity and state action. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (*quoting United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

Otter Tail was one of the first cases to wrestle with the issue of anticompetitive conduct by entrenched monopolists who sought to preempt competition from alternative energy sources. In the ensuing years, federal and state legislators and regulators have attempted to promote competition in the electric industry through restructuring. Restructuring began in earnest in the 1990s and took a major step forward when the Federal Energy Regulatory Commission ("FERC") issued the "open access" rules that gave rise to the matter now before the Court in *Enron Power Marketing, Inc. v. FERC*.[2]

Those restructuring efforts also gave rise to OG&E's "Plan of Action" that served as a roadmap for the jury's finding of monopolization in this case. *See* 10th Cir. App. vol. IX at 2426-30. As OG&E's executives testified at trial, Trigen's cooling system not only consumed less electricity than the electric chiller systems promoted by OG&E but also "co-generated" electricity. Upon the anticipated

---

[2] *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *cert. granted sub nom Enron Power Mktg., Inc. v. FERC*, 121 S. Ct. 1185 (2001) (oral argument scheduled for October 3, 2001).

restructuring scheduled to take effect in 2002, Trigen would have been in a position to compete directly with OG&E. OG&E's anti-competitive conduct is a direct response to competition from Trigen. Clothing such responses in antitrust immunity will thus frustrate federal and state efforts to restructure the electricity industry.

The FERC, the Department of Justice and recent lower court rulings have all recognized the need for increased antitrust scrutiny to assure the success of restructuring.

> Utilities that own or control transmission facilities naturally wish to maximize profit. The transmission-owning utilities thus can be expected to act in their own interest to maintain their monopoly and to use that position to retain or expand the market share for their own generated electricity, even if they do so at the expense of lower-cost generation companies and consumers.

Transmission Access, 225 F.3d at 16 (discussing the rationale of FERC's "open access" rules) (citations omitted).

The Antitrust Division of the Department of Justice has emphasized the need for antitrust vigilance in transitioning to deregulation:

> Because of the existing structure of the electric power industry, there are likely to remain significant market power problems in the transmission and generation of electricity, even as the industry is restructured to increase the role of competitive market forces.[3]

---

[3] Electricity Competition: Market Power, Mergers and Public Utility Holding Act, Statement of A. Douglas Melamed, Principal Deputy

Enforcement actions likewise demonstrate the importance of vigorous enforcement of the state action doctrine at a time when the electric utility industry is undergoing the early stages of deregulation. Announcing the filing of the Justice Department's antitrust case against Rochester Gas & Electric ("RG&E"), Assistant Attorney General Joel Klein stated:

> As the electric industry becomes increasingly deregulated, vigorous antitrust enforcement is absolutely essential to ensure that consumers benefit from competition,". . . . "This case should send a wake-up call to electric utilities. We will not tolerate private arrangements designed to thwart the introduction of competition into this important industry.[4]

The RG&E case involved a contract between RG&E and the University of Rochester in which RG&E promised to sell electricity to the university at reduced rates in exchange for the university's promise not to compete against RG&E in the sale of electricity to consumers. Reminiscent of Trigen's activity in this case, the university had intended to build a cogeneration facility—unregulated generation that would have competed with RG&E for customers of electric power.

Assistant Attorney General, Antitrust Division, before the Committee on Commerce, Subcommittee on Energy and Power (May 6, 1999), *available at* http://www.usdoj.gov/atr/public/testimony/2421.htm. *See also* Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Injecting Competition into Regulated Industries and Utilities, Address before the Public Utility, Communication and Transportation Section of the American Bar Association (Apr. 20, 1995) ("[E]ffective deregulation . . . requires alert antitrust enforcement to ensure that we do not replace regulated monopolies and cartels with unregulated ones."), *available at* http://www.usdoj.gov/atr/public/speeches/95-04-20.txt.

[4] Press Release, U.S. Dept. of Justice (June 24, 1997), *available at* http://www.usdoj.gov/atr/public/press_releases/1997/1153.htm.

Like OG&E, RG&E argued that its naked anticompetitive conduct was subject to state action immunity. The district court rejected that defense:

> While it is true that under New York law a utility company may negotiate discounted rates with certain qualified consumers, and that discounting rates is carefully supervised by the New York Public Service Commission to prevent abuse of such a practice, New York law does not authorize utility companies to offer discounted rates to potential competitors *for the purpose of preventing those potential competitors from becoming actual competitors.* Thus, while RG&E may be correct that discounting electricity rates under New York law does not violate federal antitrust laws, that conclusion does not end the inquiry.
>
> * * *
>
> I find that the goal of the State's policy of offering lower utility rates is to reduce utility costs and retain or attract businesses based on those lower utility costs. Competition from "cogenerators" in the sale of electricity is consistent with that goal. . . . Accordingly, I find that the State's policy of allowing discounted rates does not implicitly authorize anticompetitive actions on the part of Utilities seeking to prevent potential competitors from entering the market.[5]

---

[5] *United States v. Rochester Gas and Elec. Corp.*, 4 F. Supp. 2d 172, 175-176 (W.D.N.Y. 1998) (emphasis added).

Particularly as ongoing deregulation heightens concerns about market power, there is a compelling need for the Court to review the Tenth Circuit's decision expanding state action immunity in the electricity industry. Failure to do so will signal to utilities that it is "business as usual" and thus undermine the goals of restructuring.

II. CERTIORARI IS WARRANTED TO REEXAMINE THE TENTH CIRCUIT'S UNPRECEDENTED EXPANSION OF THE STATE ACTION DOCTRINE.

A. The Decision Below Violates Both the Origin and Purpose of the State Action Immunity Doctrine.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Court recognized immunity for action by state officials who approved agricultural production limits under a state statute authorizing them to "stabilize" agricultural prices. Subsequent cases presented more difficult decisions because they involved non-governmental entities or less obvious legislative mandates. Throughout, however, the Court has sought "to ensure that the state action doctrine will shelter only the *particular anticompetitive acts* of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget,* 486 U.S. 94, 100-101 (1988) (emphasis added); *see also Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985) ("Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.").

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Court first contemplated extending state action immunity to an unregulated activity of an electric utility company but held that even a "pervasively regulated" electric utility could be held liable for monopolizing the market for an unregulated product. The Court considered the purposes of

the state action doctrine—to avoid penalizing a private party for obeying the state and to avoid conflict between antitrust laws and state regulation—and found that the purposes of the doctrine would not be served by immunizing a utility when it "engages in business activity in competitive areas of the economy", *e.g.*, the unregulated market for light bulbs. 428 U.S. at 596.

The Tenth Circuit did not attempt to distinguish *Cantor* on the grounds that Michigan's regulatory scheme was less comprehensive or less actively supervised than Oklahoma's.[6] Rather, the court relied solely on the grounds that Detroit Edison "was distributing an unregulated product—light bulbs" *and* selling electricity at state-regulated rates, whereas, "OG&E only sells electricity—at state-regulated rates." Pet. App. 12a (footnote omitted). There is no meaningful distinction between *giving* away light bulbs and merely *promoting* the use of electric chillers to

---

[6] On its face Michigan's regulatory scheme appears to be as comprehensive as Oklahoma's current scheme. Compare *Cantor*:

> A Michigan statute vests the Commission with 'complete power and jurisdiction to regulate all public utilities in the state . . . .' The statute confers express power on the Commission 'to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities.'

428 U.S. at 584 (footnote omitted), with *Trigen*:

> The Oklahoma Constitution . . . provides that the OCC 'shall have the power and authority and be charged with the duty of supervising, regulating and controlling all . . . transmission companies doing business in this State, [and] in all matters relating to the performance of their public duties and their charges therefor . . . .'

Pet. App. 9a (citations omitted).

stimulate demand for electricity. In both cases the result is the same: the utilities' electricity marketing plans injured competition in the market for an unregulated product.

Here, instead of applying *Midcal's* two-prong test, the Tenth Circuit made a single inquiry: whether OG&E is a state-regulated entity. *See* Pet. App. 9a. This should have been the *beginning* of the state action immunity analysis, not the *end*. By stopping there, the Court of Appeals did not address the critical issue: Whether OG&E was pursuing the state's interest when it engaged in the "particular anticompetitive acts" proven here — disparagement, false representations and bribery for the express purpose of "remov[ing] customers from Trigen" in the unregulated market for cooling services.

In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court reiterated that the purposes of the Sherman Act and of *Parker* are "prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." 499 U.S. at 378. To remain faithful to those purposes, the Court carefully parsed the private defendant's actions and refused to extend antitrust immunity to conduct strikingly similar to OG&E's, *e.g.*, "trade libel" and "inducement to breach of contract." 499 U.S. at 384.

Amici respectfully submit that a similar analysis of the specific acts proven at trial in this case demonstrates the inapplicability of state action immunity.

B. The Tenth Circuit's Status-Based Holding is at Odds With the Court's Functional Approach to the Grant of Governmental Immunity to Private Parties.

The Tenth Circuit's grant of blanket immunity to OG&E violates not only specific state action immunity precedent, but also the Court's approach to immunity

generally.[7] The transfer of a sovereign's immunity to a private party turns on a careful analysis of the specific governmental functions that private party is fulfilling. And immunity so transferred is limited to those functions. For example, in *Forrester v. White*, 484 U.S. 219 (1988), the Court considered whether a judge discharging an employee enjoyed absolute immunity from liability:

> Running through our cases, with fair consistency, is a "functional" approach to immunity questions . . . Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.

Id. at 224.[8]

---

[7] The Court has previously noted the parallels between state action immunity in the antitrust context and the state action inquiry conducted in the Civil Rights Act, 42 U.S.C. § 1983, and Fourteenth Amendment contexts. *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 195 (1988) ("Although by no means identical, analysis of the existence of state action justifying immunity from antitrust liability is somewhat similar to the state action inquiry conducted pursuant to §1983 and the Fourteenth Amendment."). *See also Cantor*, 428 U.S. at 594 n.31 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)).

[8] *See also Clinton v. Jones*, 520 U.S. 681, 695 (1997) ("As our opinions have made clear, immunities are grounded in the 'nature of the function performed, not the identity of the actor who performed it.'") (citation omitted); *Briscoe v. Lahue*, 460 U.S. 325, 342 (1983) ("Our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."); *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982) ("in general our cases have followed a functional approach to immunity law"); *see also Richardson v. McKnight*, 521 U.S. 399, 416 (1997) ("immunity is determined by function, not status") (Scalia, J., dissenting).

A status-based rule also is inconsistent with the Court's rulings in the broader field of the state action doctrine. While it encompasses a wider range of factual situations, the doctrine requires a close *nexus* between the state and the specific challenged private conduct.

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for the purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-351 (1974) (citations and footnotes omitted). *See also Evans v. Newton*, 382 U.S. 296, 299 (1966) ("[W]here private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.").

A functional test for the extension of governmental immunity to non-government entities is essential to avoid the abuse of status—whether by a sitting President of the United States or executives of a state-regulated utility.

CONCLUSION

For the foregoing reasons, the *Amici* urge the Court to grant the Petition and correct an erroneous expansion of the state action doctrine that threatens to immunize anticompetitive conduct and shield unwarranted exercise of market power by utilities competing in unregulated markets.

Respectfully Submitted,

WILLIAM A. MOGEL
Counsel of Record
SCOTT T. KRAGIE
JAMES P. WEHNER
SQUIRE, SANDERS & DEMPSEY L.L.P.
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-6600

Counsel for Amici Curiae

September 28, 2001

(5)

Supreme Court, U.S.
FILED
OCT 9 2001
CLERK

No. 01-178

IN THE

Supreme Court of the United States

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Petitioner,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BERNAYS T. BARCLAY
KING & SPALDING
1185 Avenue of the Americas
New York, NY 10036
(212) 556-2100

GRIFFIN B. BELL
KEVIN R. SULLIVAN
Counsel of Record
JEFFREY S. BUCHOLTZ
KING & SPALDING
1730 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 737-0500

Attorneys for Petitioner

October 9, 2001

H7P

QUESTION PRESENTED

Whether a state-regulated private utility enjoys state-action immunity from antitrust liability for its monopolization of an unregulated market by means of non-price anti-competitive conduct neither approved nor supervised by the State.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: Page:

AT&T v. Central Office Tel., Inc.,
524 U.S. 214 (1998) 9

Cantor v. Detroit Edison Co.,
428 U.S. 579 (1976) 4, 5, 6

Continental Ore Co. v. Union Carbide Corp.,
370 U.S. 690 (1962) 9

DFW Metro Line Servs. v. Southwestern Bell Tel. Corp.,
988 F.2d 601 (5th Cir. 1993) 4

FTC v. Superior Court Trial Lawyers Ass'n,
493 U.S. 411 (1990) 10

FTC v. Ticor Title Ins. Co.,
504 U.S. 621 (1992) ..... *passim*

In re Lower Lake Erie Iron Ore Antitrust Litig.,
998 F.2d 1144 (3d Cir. 1993) 9

Major League Baseball Players Ass'n v. Garvey,
121 S.Ct. 1724 (2001) (per curiam) 8

National Collegiate Athletic Ass'n v. Smith,
525 U.S. 459 (1999) 8

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973) 5

Patrick v. Burget,
486 U.S. 94 (1988) 8

Ticor Title Ins. Co. v. FTC,
922 F.2d 1122 (3d Cir. 1991) 7

Ticor Title Ins. Co. v. FTC,
998 F.2d 1129 (3d Cir. 1993) 7

Town of Concord v. Boston Edison Co.,
915 F.2d 17 (1st Cir. 1990) 5, 8

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985) 6, 7

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.,
382 U.S. 172 (1965) 10

Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.,
121 S. Ct. 1776 (2001) 8

Constitutional Provisions, Statutes, and Rules:

U.S. Const. amend. I 9

15 U.S.C. § 2 ..... 6, 8

Fed. R. Civ. P. 50 6

REPLY BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*

The decision below holds that if a utility's rates are regulated, it is immune from antitrust liability, even if the particular anti-competitive conduct challenged is non-price predation neither authorized nor supervised by the State. This decision extends private-party immunity far beyond what this Court's precedents countenance, and it comes at a critical time of transition when market-power concerns in many industries are heightened and the need for vigorous antitrust enforcement is correspondingly great. *See* Pet. 8-12; Brief of *Amici Curiae* National Energy Marketers Ass'n, et al. 2-8; Brief of *Amici Curiae* United States Combined Heat and Power Ass'n, et al. 1-4, 9-12. By basing immunity on status rather than conduct, the decision below will sow confusion and frustrate the States' ability to protect their citizens. By raising a litany of unrelated issues and failing to face the question presented, respondent OG&E's brief in opposition further underscores the need for review.

OG&E's brief in opposition cannot obscure the reality that the decision below departed from this Court's precedents by conferring blanket immunity based on OG&E's status as a regulated utility, despite the fact that Oklahoma neither authorized nor supervised the anti-competitive conduct at issue. OG&E does not contend that Oklahoma clearly authorized or actively supervised the *non-price* predatory conduct for which the jury found OG&E liable, including misrepresentations, contractual interference, and improper payments. Rather than meet the question presented, OG&E attempts to change the subject.

First, in its defense of the Tenth Circuit's state-action immunity holding, OG&E proceeds as if the jury found it liable for charging predatory *rates*. This is mere evasion; Trigen does not challenge any of OG&E's rates. Second, even though the decision below rested entirely on state-action immunity, much of OG&E's opposition does not

address this issue at all but rather reargues the weight of the evidence and complains of trial rulings on other issues. OG&E distorts the record and misstates the law on these new issues, but that ultimately is beside the point, for OG&E offers no support for its suggestion that this Court reach out to resolve these fact-dependent issues in the first instance. OG&E's inability to face the question actually presented testifies powerfully to the need for review.

1. OG&E does not dispute that, under this Court's precedents, a private party is not immune unless its "*particular anticompetitive conduct at issue*" was both clearly authorized and actively supervised by the State. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992) (emphasis added). Our petition described OG&E's "extensive and varied non-price predatory conduct" in furtherance of its Plan of Action to "remove customers from Trigen." Pet. 2-3. The petition made crystal clear that Trigen did not and does not claim that OG&E's *rates* are predatory. Pet. 1-4; *see also* 10th Cir. App. vol. I at 36-41 (amended complaint).[1] And the petition explained that the Tenth Circuit adopted an unprecedented status-based immunity by holding that "[a]s a state-regulated electric utility, OG&E has clearly met the two-prong test for state action immunity," Pet. App. 9a, even though the court did not and could not find that the challenged non-price predatory conduct was authorized or supervised by Oklahoma.

a. Precluded by the record from contending that Oklahoma authorized or supervised the non-price conduct

---

[1] Trigen's claims concerning the County and Corporate Tower do not involve OG&E's rates even in passing. One aspect of Trigen's claim concerning Oklahoma City is OG&E's misrepresentation of the benefits that the City would obtain with OG&E's RTP tariff, but this claim in no way challenges the RTP tariff itself. Trigen's claim is not that the RTP tariff is predatory, but the opposite: that because OG&E could not win the competition for the City on the basis of price, OG&E resorted to misrepresentations and other non-price predation. *See also* Pet. 4 & n.3.

that Trigen challenges here, OG&E has rewritten Trigen's complaint as a challenge to OG&E's rates. Thus OG&E attributes to Trigen an "assertion that the OCC does not actively supervise OG&E's rates." Opp. 14. Trigen has made no such assertion. For this reason, OG&E's detour into the 1996-97 OCC proceedings is irrelevant. Whether or not these proceedings show that the OCC's review of OG&E's rates is "detailed, deliberate and judicious," Opp. 12, these rate proceedings plainly cannot show that Oklahoma clearly authorized and actively supervised the non-price conduct at issue in this case.

OG&E's account of these OCC proceedings also is incorrect. OG&E claims that the OCC's February 11, 1997 Order "specifically rejected Trigen's position on the RTP tariffs." Opp. 13. The Order did no such thing -- it involved unrelated issues and did not even mention the RTP tariff.[2]

b. When OG&E does not misdirect the Court's attention to its rates, it offers vague and unsupported assertions that the court below correctly found that Oklahoma supervises "OG&E" (Opp. 15), "OG&E's activities" (Opp. 15, 17), or "OG&E's conduct" (Opp. 7). These empty generalities cannot come close to satisfying this Court's private-party immunity precedents. As our petition explained, "[n]o one

---

[2] This Order is reprinted at App. 1a, *infra*. OG&E's statement that "the OCC considered and rejected Trigen's similar allegations" in the 1996-97 proceedings is equally disingenuous. In the OCC, contrary to its position in the court below, OG&E argued successfully that "the Commission is without jurisdiction to determine or adjudicate the private dispute between Trigen and OG&E now pending in the federal District Court, and the Commission is equally without jurisdiction to entertain allegations of anticompetitive practices which might occur now or in the future." OG&E Mot. in Limine (filed Jan. 17, 1997) (reprinted at App. 21a, 28a, *infra*); *compare* Pet. App. 13a-14a (holding below that the OCC has exclusive jurisdiction over Trigen's state-law antitrust and tort claims). In addition, any implication that Trigen settled its claims in the Settlement Agreement approved by the OCC on February 11, 1997 is untrue; Trigen was not a party to that Agreement. *See* App. 9a, *infra*.

disputes that the OCC 'supervises OG&E,' [Pet. App. 10a], to some extent and in some respects. The relevant question under this Court's precedents, however, is whether 'the particular anticompetitive conduct at issue . . . [was] supervised by governmental actors.'" Pet. 15 (quoting *Ticor*, 504 U.S. at 634). OG&E, like the Tenth Circuit, conspicuously fails to address that critical question.[3]

c. Although OG&E disclaims any blanket, status-based immunity and describes the decision below as "unremarkable," Opp. 7, 10-11, this description does not withstand examination. First, OG&E embraces the holding below that its "alleged 'bad acts'" could not "somehow destroy" its immunity. Opp. 18-19. Under *Ticor*, however, not even a regulated utility has immunity "in the air," divorced from an analysis of the State's involvement in the "bad acts" at issue. OG&E offers no response at all to our explanation of the Tenth Circuit's error in beginning from a premise -- indeed, a seemingly conclusive presumption -- of blanket immunity for regulated utilities. *See* Pet. 17.

OG&E likewise embraces the holding below that because "OG&E is *selling* only one thing -- electricity at state-regulated rates," it is immune for any and all *conduct*. Pet. App. 11a (emphasis added). OG&E does not dispute that it would be subject to "antitrust standards" under *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 (1976), if it "engage[d] in business activity in [a] competitive area[ ] of the economy." *See* Opp. 16-17. But OG&E contends that it

---

[3] Citing *DFW Metro Line Servs. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601 (5th Cir. 1993), OG&E chides Trigen (Opp. 15) for supposedly making the "'ludicrous'" argument that "the OCC does not actively supervise OG&E." The very sentence quoted by OG&E, however, demonstrates that the *DFW* court analyzed whether the State supervised "the conduct in question," 988 F.2d at 607, not merely whether it supervised "the defendant." Because the plaintiff challenged the rates that the defendant charged it and those rates were actively supervised, the court held that the defendant was immune for the conduct in question. *See id.* at 605-07.

could not have been so engaged, because it "was only attempting to market and sell one product, electricity." *Id.*

There can be no mistaking the import of the Tenth Circuit's holding. Every electric utility sells electricity at regulated rates. If an electric utility's sales at regulated rates immunized anything and everything that the utility might do, then every electric utility would enjoy a blanket immunity based on its status "[a]s a state-regulated utility," Pet. App. 9a. Such a result would make nonsense of this Court's admonition that "there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities." *Cantor,* 428 U.S. at 596 n.35 (citing *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973)); *accord, e.g., Town of Concord v. Boston Edison Co.,* 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.) ("Even though Boston Edison is a regulated firm, it has no blanket immunity from antitrust laws.").

The court below also ignored the record in holding that OG&E could not be "engage[d] in business activity in [a] competitive area[ ] of the economy" under *Cantor* because it sells only electricity, *see* Pet. App. 11a-12a, and OG&E ignores the record in defending that holding. Most obviously, OG&E conceded that "Trigen and OG&E are direct and substantial competitors." OG&E 10th Cir. Br. 9. Even without that concession, it would be difficult to understand why OG&E implemented a "Plan of Action" to "remove customers from Trigen" if OG&E was not engaged in a competitive area of the economy.

OG&E disputes Trigen's definition of the relevant market as the market for cooling services, and asserts that the Tenth Circuit rejected that definition. *See* Opp. 6, 8, 24-25. It is unclear whether OG&E means to defend the holding below that OG&E is immune because it was not engaged in a competitive area of the economy, or to raise a separate challenge to the verdict. OG&E is wrong regardless.

First, as our petition explained, immunity attaches to *conduct*, not to markets or products. Because Oklahoma did not clearly authorize or actively supervise OG&E's conduct challenged here, OG&E is not immune. The proper market definition might relate to other issues under § 2 of the Sherman Act, but it does not determine whether OG&E is immune. *See* Pet. 19-20. Accordingly, even if the Tenth Circuit had held that the jury's market-definition finding was not supported by the evidence, such a conclusion would not have justified the court's holding that OG&E was immune.

Second, contrary to OG&E's assertions, the Tenth Circuit did not purport to reject the jury's market-definition finding. The court did not mention the jury's finding or the standard of review under Fed. R. Civ. P. 50, *see* Pet. 18-19, and properly so: the evidence abundantly supported the jury's finding.[4] Rather, the court appears to have held that OG&E could not have been participating in the competitive cooling-services market for purposes of *Cantor* because it does not sell chillers. As explained above, this holding cannot be reconciled with the record, and it in any event misconceives the immunity inquiry by focusing on what products OG&E was selling rather than on whether the State authorized and supervised OG&E's conduct at issue.[5]

---

[4] OG&E's parade of horribles (Opp. 24) ignores that (1) the jury heard *evidence* demonstrating that consumers perceived OG&E and Trigen as the only real alternatives for cooling services, and that the cost of the additional input of a chiller did not significantly affect their choice, 10th Cir. App. vol. IX at 2304-36, 2349-59, 2408-13; (2) OG&E opted not to offer any evidence on this issue; and (3) products and services need only be reasonably interchangeable, and not technologically identical, to be in the same market, Pet. 19-21 & n.16; *see also* Brief of *Amici Curiae* United States Combined Heat and Power Ass'n, et al. 7-9.

[5] OG&E also argues (Opp. 19-20) that because a municipality's anti-competitive conduct can be immune even if not actively supervised by the State, its conduct directed at municipalities should be immune without any supervision. OG&E cites *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), but ignores that the Court took pains to

2. a. Much of OG&E's opposition does not defend the state-action immunity holding below at all, but argues that OG&E should prevail on other grounds. In the first place, as arguments against *certiorari*, these arguments are baffling. Just as in *Ticor,* the decision below rested solely on state-action immunity grounds, and it therefore squarely presents the question addressed by our petition.[6] The prospect that the respondent might prevail on other grounds on remand is as beside the point here as it was in *Ticor*. *See also Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129 (3d Cir. 1993) (considering McCarran-Ferguson Act and *Noerr* arguments on remand from this Court). Moreover, to the extent that OG&E suggests that *this Court* should reach these new

---

distinguish private parties from municipalities: "We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Id.* at 45 (footnote omitted). Moreover, OG&E errs in accusing Trigen of "attempt[ing] to veto government action." Opp. 20. Trigen sued OG&E because OG&E -- and not the County or City -- implemented a predatory Plan of Action to remove customers from Trigen and monopolize the cooling-services market. In any event, because Oklahoma did not clearly authorize OG&E's non-price predation, OG&E would not be immune even if (contrary to fact) no supervision requirement applied. *See* Pet. 16.

[6] *Compare* Pet. App. 6a ("Because we hold that the state action doctrine mandates the dismissal of the federal antitrust claims . . . we decline to reach the *Noerr-Pennington* and filed rate doctrine defenses. Nor is it necessary to address OG&E's arguments concerning reversible error at trial . . . .") *with Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122, 1140 n.17 (3d Cir. 1991) ("Because we hold that Ticor's setting of collective rates . . . is immune from antitrust liability under the state action doctrine, it is unnecessary to consider whether the same activity is also exempt from antitrust regulation under the McCarran-Ferguson Act . . . [or] the *Noerr-Pennington* doctrine."). OG&E's claim that the Tenth Circuit "did address several key elements of these other grounds," Opp. 21, is unfounded. The decision below did not reach in any manner OG&E's *Noerr*, filed-rate, or antitrust injury arguments, OG&E's challenge to the jury's finding of anti-competitive conduct, or OG&E's complaints about the jury instructions or the district judge's evidentiary rulings.

issues in order to affirm the judgment below on other grounds, *see* Opp. i, that suggestion ignores this Court's practice. *See, e.g., National Collegiate Athletic Ass'n v. Smith,* 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"). OG&E offers no reason why this Court should depart from its usual practice by reaching out to resolve these fact-intensive issues.

b. OG&E's arguments on these new issues are meritless in any event. Because these arguments are beside the point as just explained, and because Trigen's briefs in the court below respond fully to them, we point out here only a few of OG&E's errors.

First, OG&E maintains that what it light-handedly terms its "marketing and sales efforts" (Opp. 18 n.9) were innocuous and not anti-competitive as required by § 2. *See also* Opp. 8-9, 25-26. But in offering a selective and tendentious account of its conduct, *see, e.g.,* Opp. 18 n.9, OG&E forgets that, as the verdict-loser, the record must be viewed in the light least favorable to it. *See, e.g., Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.,* 121 S.Ct. 1776, 1779 (2001); *Patrick v. Burget,* 486 U.S. 94, 98 n.3 (1988); *cf. Major League Baseball Players Ass'n v. Garvey,* 121 S.Ct. 1724 (2001) (per curiam). For example, OG&E fails to explain how its method of "Trigen competition" -- paying $138,000 for no apparent work to the son of a county commissioner whose vote OG&E needed -- qualifies as "competition based on price and service," Opp. 3 n.1. Nor does OG&E explain what misrepresentations, interference with contract, and wining and dining public officials have to do with "competition's basic goals -- lower prices, better products, and more efficient production methods." *Town of Concord,* 915 F.2d at 22; *see also* Pet. 2-3 & n.1.

Second, in its argument based on the filed-rate doctrine, OG&E again quarrels with the verdict, dismissing what the jury must be presumed to have found was a misrepresentation as merely an "incorrect estimate[ ]," and

seeking to shift the blame to its "consultants." Opp. 23. OG&E also misstates the law. This Court has *not* held that "[t]he filed-rate doctrine bars any suit based on incorrect estimates of a tariffed service, 'even if a carrier intentionally misrepresents its rate.'" *Id.* (quoting *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998)). This Court's statement, when quoted in full, makes clear that *Central Office* bars a suit to *enforce* a promised rate that differs from the filed rate: "Thus, even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff." 524 U.S. at 222. The jury did not order OG&E to charge Trigen a non-filed rate, and it did not award Trigen a refund of the difference between any promised non-filed rate and OG&E's filed rates. Instead, the jury awarded Trigen the profits that it lost because of (among many other things) OG&E's misrepresentations to the City of the average cost that it would obtain using the RTP tariff. *See also supra* at 2 n.1. The filed-rate doctrine has no application here. *See, e.g., In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993) (filed-rate doctrine "does not preclude liability based on non-rate anticompetitive activity").

Third, OG&E's claim of *Noerr* immunity is misplaced as well. The *Noerr* doctrine is an interpretation of the Sherman Act designed to avoid penalizing citizens for exercising their right to "petition the Government for a redress of grievances." U.S. Const. amend. I. The Petition Clause, however, does not guarantee a right to wine and dine government purchasing agents. As this Court emphasized in *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 707-08 (1962), when a company is "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws," applying the Sherman Act does not "remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr*."

Extending *Noerr* immunity to OG&E's purely commercial activity would remove government contracting from the coverage of the antitrust laws. Moreover, *Noerr* protects efforts to procure legislation that permits activity that otherwise would be unlawful; it does not protect activity that otherwise is unlawful just because that activity is directed at a government. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 424-25 (1990); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.,* 382 U.S. 172, 177 (1965). Accordingly, OG&E did not immunize its predatory conduct by including governments among its targets.

CONCLUSION

For the reasons stated herein and in Trigen's petition, *certiorari* should be granted.

Respectfully submitted,

Bernays T. Barclay
KING & SPALDING
1185 Avenue of the Americas
New York, NY 10036
(212) 556-2100

Griffin B. Bell
Kevin R. Sullivan
Counsel of Record
Jeffrey S. Bucholtz
KING & SPALDING
1730 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

October 9, 2001

Attorneys for Petitioner

APPENDIX

INDEX

APPENDIX Page

A. Order of the Oklahoma Corporation Commission approving joint stipulation and settlement agreement (Cause No. PUD 960000116) (Feb. 11, 1997) 1a

B. OG&E Brief in Support of Motion in Limine (Cause No. PUD 96000016) (Jan. 17, 1997)..... 21a

APPENDIX A

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR AN ORDER OF THE COMMISSION AUTHORIZING APPLICANT TO MODIFY ITS RATES, CHARGES AND TARIFFS FOR RETAIL ELECTRIC SERVICE IN OKLAHOMA	)))))))))	CAUSE NO. PUD 960000116 ORDER NO. 409383

Hearings: May 16, June 17, July 11, 25, August 8, 29, September 5, 12, 19, 26, 30, October 10, 11, 17, 21, 24, 31, and November 7, 13, 14, 21, 22, 1996 before the Administrative Law Judge;

November 22, 25, December 16, 18, 1996, and January 6, 13, 14, 15, 16, 21, 22, 23, 1997 before the Commission *en banc*.

Appearances: H.D. Binns, Jr., Robert D. Stewart, Jr., Diane S. Goldschmidt, and John W. Harbour, Jr., Attorneys for Oklahoma Gas and Electric Company;

Maribeth D. Snapp, Andrea P. Johnson, Cece Wood, and Jacqueline T. Miller, Attorneys for the Public Utility Division, Oklahoma Corporation Commission;

Rick D. Chamberlain and Mickey S. Moon, Attorneys for the Attorney General of the State of Oklahoma;

William J. Bullard and Kimberly K. Blaylock, Attorneys for the Oklahoma Industrial Energy Consumers and Air Liquide America Corporation;

J. Fred Gist, James D. Satrom, and G. Dean Luthey, Jr., Attorneys for Terra International (Oklahoma), Inc.;

George M. Makohin, Attorney for GPM Gas Corporation;

John A. Gaberino, Jr., Robert A. Huffman, Jr., and Vivian C. Hale, Attorneys for Oklahoma Natural Gas Company/ONG Transmission Company;

D. Kent Meyers, Robert E. Bacharach, Bernays T. Barclay, and Erik J. Swenson, Attorneys for Trigen-Oklahoma Energy Corporation;

John J. Breathwit and Babette Patton, Attorneys for The PowerSmith Cogeneration Project;

Cody B. Waddell, Attorney for the Commission on Marginally Producing Oil and Gas Wells;

Richard R. Wilfong, Attorney for Oklahoma Gas and Electric Company's Shareholders' Association;

W. Bland Williamson, Steven J. Goetziinger, Henry A. Meyer, III, and John J. Randolph, Attorneys for Oklahoma Independent Petroleum Association;

John Lovett and Brent B. Moore, Attorneys for Oklahoma Mid-Continent Oil and Gas Association;

Cheryl A. Vaught, Attorney for Mid-Continent Power Company, Inc.; and

Thomas F. Golden and William R. Burkett, Attorneys for AES Shady Point, Inc.

ORDER APPROVING JOINT STIPULATION AND SETTLEMENT AGREEMENT

BY THE COMMISSION:

The Corporation Commission of the State of Oklahoma ("Commission") being regularly in session and the undersigned Commissioners being present and participating, the Joint Stipulation and Settlement Agreement made and executed by Oklahoma Gas and Electric Company ("OG&E" or "Applicant" or "Company"), the Public Utility Division of the Oklahoma Corporation Commission ("Staff"), the Attorney General for the State of Oklahoma ("AG"), the Oklahoma Industrial Energy Consumers ("OIEC"), Terra International (Oklahoma), Inc. ("Terra"), Air Liquide

America Corporation ("Air Liquide"), The PowerSmith Cogeneration Project ("PowerSmith"), the Commission on Marginally Producing Oil and Gas Wells ("Marginal Well Commission"), Oklahoma Gas and Electric Company's Shareholders' Association ("Shareholders"), the Oklahoma Independent Petroleum Association ("OIPA"), Mid-Continent Power Company ("MCPC"), Oklahoma Mid-Continent Oil & Gas Association ("CO&G"), and AES Shady Point, Inc. ("AES"), all hereinafter collectively referred to as the "Stipulating Parties," comes on for consideration. A copy of the Joint Stipulation and Settlement Agreement (hereinafter referred to as the "Stipulation") is attached hereto as "Attachment A" and incorporated herein by reference.

PROCEDURAL HISTORY AND SUMMARY OF THE EVIDENCE

On May 2, 1996, OG&E filed its Notice of Intent with attached exhibits indicating the Company's intent to file for rate review in accordance with the Commission's Rules (OAC 165:70). The Attorney General of the State of Oklahoma filed a Motion to Intervene on May 10, and that Motion was granted May 21, 1996, by Commission Order No. 402038. On June 12, the Company filed its Motion for Protective Order.

One June 17, 1996, OG&E filed with the Commission an Application seeking to reduce its Oklahoma jurisdictional gross annual revenues, exclusive of gross receipts or franchise taxes, in the amount of $14.2 million effective with its first billing period in the month of March, 1997. Concurrently with the filing of the Application, the Company filed its Application Package comprising the Minimum Standard Filing Requirements as required by OAC 165:70. Contained in the Application Package, consisting of two

volumes,[1] OG&E submitted the prefiled testimony of Mr. James R. Hatfield, Mr. William D. Steinmeier, Mr. Charles A. Benore, Mr. Don L. Young, Mr. Jack T. Coffman, Mr. Byron F. Johnson, Mr. John Gunesh, and Mr. William L. Wylie, along with schedules and exhibits for the test year ending December 31, 1995, reflecting Oklahoma jurisdictional operational *pro forma* revenues of $1,011,873,001. Based upon the *pro forma* adjusted test year as reflected in the Company's exhibits, OG&E requested in its Application that its *pro forma* Oklahoma jurisdictional revenues be reduced by $14,209,880 effective with the first billing cycle in the revenue month of March 1997.

The Commission granted OG&E's request for protective order by issuing Order No. 402839 on June 24, and attached a Proprietary Agreement form for the use of the parties in this proceeding. On July 3, the OIEC and Terra filed motions to intervene, and on July 8, 1996, the Staff filed its statement reflecting substantial compliance with OAC 165:70 by the Applicant with respect to the Application Package submitted and filed with the Commission. GPM filed its Motion to Intervene on July 16, and July 17, 1996, the Commission issued Orders Numbered 403464 and 403465 which respectively set the hearing on the merits of this cause before the Commission *en banc* and granted intervenor status in this proceeding to Terra and OIEC. On July 24, 1996, Trigen filed its Motion to Intervene. On July 30, the Commission entered Order No. 403870 granting GPM's Motion to Intervene, and on August 14, the Commission entered Order No. 404252 granting Trigen's Motion to Intervene.

---

[1] Volume I containing the Application and the prefiled testimony of all OG&E's witnesses supporting Applicant's direct case was received in evidence as Exhibit 8; Volume II containing Company's Test Year schedules and exhibits supporting the requested rate reduction was received in evidence as Exhibit 9.

On August 23, 1996, Air Liquide and ONG filed Motions to Intervene, and on August 29, the Marginal Well Commission filed its Motion to Intervene in this proceeding. On September 6, 1996, PowerSmith filed its motion seeking intervenor status, and on the same date the Commission issued Order No. 404968 granting Air Liquide's and ONG's Motions to Intervene. Thereafter, on September 10, the Commission granted intervenor status to the Marginal Well Commission by Order No. 405042. On September 11, the Shareholders filed its Motion to Intervene, and on the following day the OIPA moved to intervene in the case. GPM filed its list of major issues in this case on September 13; Staff and ONG filed their lists of major issues on September 17; Terra, Air Liquide, and OEIC filed their lists of major issues on September 18; and the AG and the Marginal Well Commission filed their lists of major issues on September 19. MCPC and CO&G filed motions to intervene on September 20. The Commission granted OIPA's Motion to Intervene by Order No. 405461 issued on September 24. On October 2, AES filed its Motion to Intervene. The Shareholders were granted intervenor status on October 3, 1996, by Order No. 405736.

The Commission issued its Scheduling Order for this proceeding in its Order No. 405789 on October 4, 1996, and on October 14, 1996, Staff, the AG, OIEC, and Terra filed responsive testimony addressing Applicant's revenue requirement. Staff filed exhibits supporting its position[2] and prefiled responsive testimony of B. Aurobindo, David Dorsey, Malini Ghandi, Glen Gregory, Susan Hayes, David Jones, George Kiser, Larry Manning, George Mathai, Michael Read, G. David Scalf, Vibha Thacker, Steve Wilt, and Miranda Xing. The AG filed prefiled responsive

[2] Staff Accounting Exhibit was admitted in evidence as Exhibit 94 and an amendment thereto was admitted in evidence as Exhibit 134.

testimony of Michael Brosch[3] and Steve Carver along with exhibits supporting their position; OIEC filed prefiled responsive testimony of Mark Garrett, Michael Gorman, and James Selecky; Shareholders filed prefiled testimony and exhibits of Donald A. Murray; and Terra filed prefiled testimony and exhibits of Douglas Burton. On October 15, 1996, statements of position were filed by ONG, Air Liquide, and Trigen. Thereafter, on October 21, 1996, pursuant to the Scheduling Order, Staff, the AG, OIEC, Terra, GPM, and the Marginal Well Commission filed responsive testimony addressing issues other than Applicant's revenue requirement. In that connection, Staff filed prefiled testimony of David Brammer,[4] Lynn Ferry, and Kenneth Zimmerman; the AG filed additional prefiled testimony of Michael Brosch; OIEC filed additional testimony of James Selecky; Terra filed additional testimony of Douglas Burton; GPM filed testimony of John F. Brown;[5] and the Marginal Well Commission filed testimony of A.M. Alloway. On October 29, OIPA filed prefiled responsive testimony of Mickey Thompson, and on October 31, 1996, Staff Witness Ferry filed prefiled testimony amending her previously filed testimony.

The Commission issued its Notice of Hearing[6] on October 28, 1996, setting the hearing on the merits in this case before the Commission *en banc* to commence on November 22, 1996, and on November 20, 1996, Proof of

---

[3] Portions of Mr. Brosch's prefiled testimony were admitted in evidence as Exhibits 346, 347 and 348.

[4] Direct testimony admitted in evidence as Exhibit 135 and Amended testimony admitted as Exhibit 197.

[5] Admitted in evidence as Exhibit 139.

[6] Exhibit 157 in the record of this cause.

Publication[7] of the Notice of Hearing and the Affidavit of Publication[8] of the Notice of Hearing were filed by the Tulsa World and by The Daily Oklahoman, respectively. In addition, the Company gave actual notice of the hearing to be conducted by the Commission to all of its Oklahoma jurisdictional customers through a bill insert[9] in compliance with the Commission's Notice of Hearing.

The Company filed prefiled rebuttal testimony of its witness, Mr. William Steinmeier, on November 5, and on November 6, 1996, OG&E prefiled rebuttal testimony and exhibits of Mr. Martin Blake, Mr. Mike Davis, Dr. Jay Lukens,[10] Mr. Don Rowlett,[11] and of all remaining witnesses who filed testimony in support of Applicant's request for rate reduction. In further compliance with the Scheduling Order, on November 18, 1996, the parties to this proceeding filed and exchanged summaries of all testimony filed and those parties not presenting witnesses in support of their position were given an opportunity to file statements of positions.

This cause came on for hearing before the Commission *en banc* on November 22, 1996, as specified in the Notice of Hearing, and with all parties present and participating, the hearing on the merits was continued on the record to 1:30 p.m. on November 25, 1996, to give the parties additional time to negotiate a settlement of the issues related to the Application filed herein. Thereafter, on November 25, 1996, with all parties present and participating, the Stipulating Parties, as identified in the Stipulation attached hereto as Attachment A, announced a settlement in principle of most

---

[7] Exhibit 276 in the record of this cause.

[8] Exhibit 275 in the record of this cause.

[9] Exhibit 345 in the record of this cause.

[10] Exhibit 187 in the record of this cause.

[11] Exhibit 188 in the record of this cause.

of the issues in this proceeding. The Commission thereupon continued this cause to 9:00 a.m. on December 16, 1996, to give the Stipulating Parties an opportunity to prepare and file the Joint Stipulation and Settlement Agreement. On December 16, 1996, this cause came on for hearing and the parties announced that thirteen of the sixteen participants in this cause had reached a settlement and compromise of all issues, and this matter was continued to December 17, 1996 at 1:30 p.m. to allow the stipulating parties an opportunity to execute a settlement document. On December 17, 1996, the stipulating parties confirmed their acceptance of the settlement and advised the Commission that a majority of the stipulating parties had executed the Joint Stipulation and Settlement Agreement. The non-stipulating parties[12] advised the Commission that they had been unsuccessful in reaching a settlement with all of the stipulating parties, and this matter was continued to January 6, 1997, at 9:30 a.m. for further proceedings.

On January 2, 1997, the executed Joint Stipulation and Settlement Agreement[13] ("Stipulation") was filed with the Commission, and on January 6, 1997, this cause come on for hearing before the Commission as scheduled. At that time the Commission determined that a hearing should be had to determine whether the Stipulation should be accepted by the Commission and to give the non-stipulating parties an opportunity to present their objections to the Stipulation as filed. To those ends this cause was continued, to be reconvened at 9:30 a.m. on January 13, 1997, before the Commission. At the appointed time on January 13, 1997, the hearing on the merits with respect to the Stipulation was commenced and continued through January 16, 1997. The hearing on the merits resumed on January 21, 1997, pursuant

---

[12] ONG, GPM and Trigen.

[13] Exhibit 320 in the record of this cause, incorporated herein as Attachment "A".

to the Order of the Commission and continued through January 23, 1997, at which time the Commissioners voted unanimously to adopt the Stipulation as submitted and directed the Office of General Counsel to prepare a Final Order for the Commission to enter in this cause.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the Commission's review and evaluation of the pleadings, testimony of witnesses, the Stipulation, and evidence contained in the record for this case, and upon full and final consideration thereof, the Commission makes the following findings and conclusions:

The Commission finds that it has jurisdiction with respect to the issues raised by the Application filed herein by virtue of Article IX, Sections 18 and following of the Constitution of the State of Oklahoma, 17 O.S. §151 *et seq.*, OAC 165:5-7-61, and OAC 165:70-3-1 *et seq.* The Commission further finds that notice was given and made of these proceedings as required by law and the Notice of Hearing issued by the Commission herein, by publication and by actual notice to all of Applicant's Oklahoma jurisdictional customers.

The Commission finds that the position taken by ONG and GPM in this proceeding should be rejected. ONG and GPM urged the Commission to require OG&E to implement competitive bidding for natural gas transportation service, and for natural gas supplies to the extent that OG&E does not already procure natural gas on a competitively bid basis, within one year rather than in the three years to which OG&E has committed in the Stipulation. The Commission, having considered the arguments of the parties regarding the time for competitive bidding, finds that the position advocated to ONG and GPM is not supported by the evidence and should therefore be rejected. The Commission

further finds that the three year timeframe established by the Joint Stipulation for competitively bidding OG&E's transportation service for natural gas is fair, just, and reasonable and supported by the evidence in the record.

Mr. Coffman testified on behalf of the Company that in order to maintain a reliable supply of electricity to OG&E's customers, OG&E would need adequate time to evaluate the integration of the Company's generating stations using diverse rather than a single natural gas transportation system. The testimony before the Commission with respect to the Company's integrated fuel management system, the need for the Company to provide reliable electric service, the savings which OG&E's customers have already experienced as a result of the Company's fuel cost reduction efforts, and the Company's commitment to have competitively bid natural gas transportation services in place not later than April 30, 2000, all support a finding, and the Commission finds that paragraph 4 of the Joint Stipulation and Settlement Agreement is fair, just and reasonable.[14]

The Commission further finds that the rate reduction set forth in the Stipulation represents a balance of the competing interests of all of the Company's classes of customers. In that connection the Commission notes that all of the Company's classes of service were represented by the signatories to the Stipulation. The Commission specifically finds that while cost of service should be considered, it should not be the sole determinant in determining rates which are fair, just, and reasonable and in the public interest. Included among the factors which this Commission also considers in designing rates are customer impact, social considerations and environmental matters. The Commission finds that the rate design proposed in the Stipulation

---

[14] The testimony of Don R. Rowlett (Tr. Jan. 14, 1997, pgs rk-59 - rk-64), Dr. Jay C. Lukens (Tr. Jan. 15, 1997, pgs ja-125 - ja-131 and ja-170 - ja-172), and David Brammer (Tr. Jan. 15, 1997, pgs lw-172 - lw-188). The Commission also takes judicial notice of Order No. 380443.

represents an appropriate recognition of cost of service as well as these other factors. The Commission notes particularly that the rate reduction to the residential and all other classes is appropriate and justified as consistent with the goal of this Commission to provide the citizens of Oklahoma with reasonable rates for utility services. The Commission further finds that the Chain Account Aggregation Rider and the load curtailment riders outlined in the Stipulation and as further explained by Staff witness, Mr. Brammer, and Company witness, Mr. Wylie, are fair, just and reasonable and are fully supported and cost justified.[15] Furthermore, intervenor Trigen has presented this Commission with no evidence to support its assertion that the tariffs proposed for these riders contain provisions which are unduly discriminatory on their face. Therefore, the Commission finds that the specific relief requested by Trigen is not supported by substantial evidence. Notwithstanding this finding, however, as will be reflected below, the Director, Public Utility Division for this Commission, shall provide all parties to this proceeding with an opportunity to review the final tariffs implementing the Stipulation before they are accepted for filing.

The Commission, therefore, finds that the revenue requirement and rate design approved herein are fair, just and reasonable and in the public interest and that the Stipulation represents a fair, just and reasonable settlement of all of the issues which were raised related to this proceeding, the terms and conditions of the Stipulation are in the public interest, and said terms and conditions are supported by substantial evidence.

---

[15] Testimony of David Brammer (Tr. Jan. 22, 1997, pgs bwm-34 - bwm-45) and William L. Wylie (Tr. Jan. 13, 1997, pgs bwm-18 - bwm-61).

ORDER

IT IS THEREFORE THE ORDER OF THE COMMISSION that the Stipulation attached hereto as Attachment A should be and the same is hereby approved in all respects, and OG&E is hereby authorized and directed to file appropriate tariffs with this Commission and to do all things necessary to implement the Stipulation; and that the Company should be and is hereby authorized to rebase its Fuel Cost Adjustment tariff consistent with the findings made herein.

IT IS FURTHER ORDERED that the annual compensation to be paid to ENOGEX by OG&E for natural gas transportation service to the Company's electric generating stations as set forth in the Stipulation is fair, just and reasonable, and that the Applicant is hereby authorized and directed to recover such costs from its Oklahoma jurisdictional customers in the same manner as set forth in the Stipulation.

IT IS FURTHER ORDERED that OG&E shall provide the Director of Public Utility Division, with appropriate tariffs implementing the provisions of this Order along with appropriate proof of revenues. After providing all parties to this proceedings an opportunity to examine the Company's proposed tariffs and to provide informal written comments to the Director with respect thereto, and upon determination by the Director that such tariffs conform to the terms, conditions and provisions of this Order, the Director shall advise the Commission that the tariffs recommended for approval by the Director conform to the terms, conditions and provisions of this Order. If the Commission determines upon its review that the tariffs recommended for approval by the Director conform to the terms, conditions and provisions of this Order, the Commission will issue and order directing that such tariffs be accepted for approval by the Public Utility Division and such tariffs will be effective with OG&E's first

billing period in the month of March, 1997.

CORPORATION COMMISSION
OF OKLAHOMA

/s/ CODY L. GRAVES, CHAIRMAN

Concurring Opinion Attached
/s/ BOB ANTHONY, VICE CHAIRMAN

/s/ ED APPLE, COMMISSIONER

DONE AND PERFORMED this 11th day of February, 1997.

BY ORDER OF THE COMMISSION:

/s/ CHARLOTTE W. FLANAGAN, Secretary

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR AN ORDER OF THE COMMISSION AUTHORIZING APPLICANT TO MODIFY ITS RATES, CHARGES AND TARIFFS FOR RETAIL ELECTRIC SERVICE IN OKLAHOMA	))))))))))	CAUSE NO. PUD 960000116

CONCURRING OPINION OF
COMMISSIONER BOB ANTHONY

I concur with the Commission decision to accept a stipulated rate reduction because the settlement agreement allows the Commission to immediately initiate another case (1) seeking a further rate reduction and (2) making changes in the punitive and discriminatory provisions of today's order. Also, testimony suggests ratepayers could potentially benefit by more than $100 million in savings from reduced gas transportation expenses if OG&E considers alternatives to self-dealing with its affiliate Enogex, Inc. for transportation of gas. Therefore, this Commission can still quantify the potential benefits available to OG&E and its customers of basing gas transportation decisions on economic efficiency instead of favoritism. For example, the Commission can determine the benefits OG&E should derive from using competitive bidding for transportation of gas to its generating units and incorporate these savings into electric rates on a more accelerated basis than required by this order.

Legal Requirements for a "Black Box Settlement"

During the proceedings, I advised the parties of my concern that the record needed to meet certain legal requirements for a commission dealing with a "black box settlement." Mere statements by witnesses that a stipulated agreement is "fair, just, and reasonable" do not constitute a valid basis for adopting a proposed settlement.

The Kansas and Missouri matters I had mentioned to the parties set forth arguments and decisions which may have bearing on today's order of the Oklahoma Corporation Commission. For example, on October 15, 1996, the Citizens' Utility Ratepayer Board filed a brief before the Kansas Corporation Commission (KCC) in Docket No. 193,787-U stating:

> "Black Box" settlements are unlawful and provide no reasonable basis on which the Commission can make the requisite determinations of (1) rate base, (2) a fair rate of return, and (3) reasonable operating expenses, as required in any contested rate investigation. See, Southwestern Bell Tel Co V State Corporation Commission 192 Kan 39, 46-47, 609 P2d 1157 (1980). The Commission should accordingly reject the stipulation and agreement dated October 1, 1996, because it fails to impart sufficient information or evidence to base a determination.

Similar arguments were presented to the KCC through briefs filed by Kansas Industrial Consumers on September 13, 1996 and Farmland Industries, Inc., on September 13, 1996 in Docket Nos. 193,306-U and 193,307-U. Furthermore, on September 7, 1995 in State of Missouri v Public Service Commission of the State of Missouri (Case No. CV194-1441CC) the Circuit Court of Cole County, as a conclusion of law, stated:

when it entered into the "Settlement Agreement" it acted unlawfully and in total disregard for the administrative system established for PSC actions, in that this decision was not supported by substantial and competent evidence upon the whole record, but rather was made arbitrarily and capriciously without any evidentiary basis

I am concerned that the findings and conclusions of today's order regarding revenue requirements, rate design and other matters involving regulatory policy are not supported by substantial evidence in the case record. I believe because the rate reductions ordered by the Commission in this cause are not based upon evidentiary findings regarding rate base, reasonable operating expenses, and a fair rate of return that the conclusions could be found arbitrary and capricious if contested by a party to the proceedings. In other words, I believe today's "black box settlement" could be found unlawful if challenged, and I believe punitive and discriminatory provisions, such as those affecting Trigen, should not have been presented to the Commission on a "take-it or leave-it" basis.

However, I concur in accepting the rate decrease ordered herein because it will benefit the ratepayers of OG&E and the economy of Oklahoma. Yet, I regret that larger benefits may have been possible upon a more thorough presentation of evidence before the Commission.

The closing arguments of the Oklahoma Attorney General speak volumes when they state, ". . . taking into account the likely outcome of litigation in the absence of the stipulation[,] we believe that on that basis the stipulation constitutes a fair, just, and reasonable resolution of this case . . ." (January 23, 1997, Tr. 29). What does the Attorney General mean when referencing "the likely outcome of litigation"? In Order No. 380443 issued by a 2-1 vote of the Commission on [illegible] February 25, 1994 the outcome of

litigating the last major OG&E rate case was determined. Over my dissent, Commissioner Graves and Watts ordered a $24.0 million annual rate reduction. This 1994 order showed the Attorney General its recommended rate reduction of $52.0 million and the $71.1 million rate reduction recommended by the Commission's own staff were largely rejected by the Commission. In the current rate case the Attorney General agrees to a stipulated $50.7 million rate reduction (which goes to $55.7 million for the second and third years) despite the $96.852 million rate reduction supported by the testimony of the Attorney General's own witness on January 21, 1997 (Tr. 151) and despite the $94.5 million rate reduction recommended by the audit of the Commission's Public Utility Staff.

The Integrity of the Commission's Hearing Process

On June 18, 1996 the Attorney General filed an emergency application (Cause No. PUD 960000167) expressing his concern about restoring "the confidence of the public in the Commission's ratemaking proceedings..." The application stated, "Upon information and belief, the integrity of the Commission's hearing process continues to be subverted today by ... *ex parte* communications..." Although the Commission has not adopted new rules prohibiting *ex parte* communication, there currently are Oklahoma Rules of Professional Conduct which pertain to lawyers (O.S. Title 5, Chapter 1, Appendix 3A). Rule 3.5 states, "A lawyer shall not ... seek to influence a judge ... or other decision maker ... of a tribunal ... in an adversary proceeding, communicate or cause another to communicate as to the merits of the cause, with a judge or an official before whom the proceeding is pending ..." Rule 3.6(a) states, "A lawyer shall not make, participate in making, counsel or assist another person to make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the

lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding, including an administrative proceeding."

The public comment file of this rate case shows a letter-writing campaign was conducted largely on behalf of the Company's position. I believe the Attorney General is concerned about improper conduct in deciding utility cases, and he should consider initiating an examination of the conduct of the attorneys representing OG&E in this case. Did Mr. H. D. Binns, Jr. and Mr. Robert D. Stewart, Jr. condone, direct, or know of efforts by OG&E personnel initiating or facilitating a letter-writing campaign intended to influence the commissioners who would decide their case? I personally received over one hundred letters in support of the Company. A few individuals who wrote letters also personally told me of either receiving correspondence as a shareholder or being solicited to write commissioners by an OG&E community service representative. Counsel for OG&E chose not to respond to a request for an explanation as set forth on December 12, 1996 in a letter from the Commission's Deputy General Counsel. Also, on January 6, 1997 during the proceedings of this case before the Commission en banc (Tr. 43), Vice-Chairman Anthony asked OG&E's General Counsel, Mr. Binns, "...do you have any reason to believe that OG&E had its employees or agents or officers or lobbyists solicit letters to be written to the Commissioners?" In response, Mr. Binns stated, "... I would respectfully decline to respond to that question."

In my Dissenting Opinion of March 14, 1994, filed in response to Order No. 380443 and attached hereto, I set forth concerns about improper conduct by representatives of OG&E in the last major rate case. Someone needs to address a situation which apparently continues to exist.

Respectfully submitted this 11th day of February, 1997.

/s/ Commissioner Bob Anthony

APPENDIX B

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR AN ORDER OF THE COMMISSION AUTHORIZING APPLICANT TO MODIFY ITS RATES, CHARGES AND TARIFFS FOR RETAIL ELECTRIC SERVICE IN OKLAHOMA	))))))))))	CAUSE NO. PUD 960000116

BRIEF IN SUPPORT OF MOTION IN LIMINE

INTRODUCTION

On July 24, 1996, Trigen-Oklahoma Energy Corporation ("Trigen") filed its Motion to Intervene[1] in the captioned proceeding. As justification for its intervention, Trigen alleged:

> "As a significant industrial customer on the OG&E system, Movant is interested in any proceedings in this cause which may affect the rates charged to industrial and commercial customers by OG&E."[2]

---

[1] On November 8, 1996, Trigen filed a "Clarification of Record" which served to correct the original Motion to Intervene to reflect that the Motion "should have stated that Intervenor Trigen-Oklahoma Energy Corporation's wholly owned subsidiary is an industrial customer on the system of Oklahoma Gas and Electric Company."

[2] Motion to Intervene, ¶2(b)[.]

The Commission granted intervenor status to Trigen on this basis, without objection by OG&E, in its Order No. 404252. On October 10, 1996, Trigen filed its List of Major Issues, which filing is a prerequesite [*sic*] to the filing of testimony and exhibits pursuant to OAC 165:5-7-61(f). Thereafter, on October 15, 1996, Trigen filed a Statement of Position, the effect of which was to advise the parties that Trigen **did not** intend to file testimony or exhibits pursuant to OAC 165:5-7-61. Trigen did not file testimony of any witness addressing the specific issues relevant to Trigen's intervention; nevertheless, on November 18, 1996, Trigen filed an Exhibit List in violation of OAC 165:5-7-61(f)(2).[3] Since Trigen failed to file testimony pursuant to OAC 165:5-7-61(f)(1), the Commission's Rules do not permit the filing of a List of Major Issues to be addressed by the intervenor's witness(es). Since Trigen failed to sponsor a witness in this cause, Trigen's Exhibit List and List of Major Issues should be disregarded by the Commission in examining Trigen's standing in this case.

Trigen's Statement of Position makes it clear that Trigen's intention in these proceedings is to protect its interest as a claimed competitor of OG&E rather than as OG&E's customer. As will be demonstrated below, while Trigen has standing to address the appropriateness of the rate which OG&E intends to charge Trigen for electric services consistent with the Final Order issued by the Commission in these proceedings, Trigen has no standing to have this Commission address the competitive relationship, if any,

---

[3] OAC 165:5-7-61(f)(2) provides: "The Commission Staff, the Attorney General and any intervening party of record shall provide to the utility, thirty (30) days prior to filing responsive testimony, a list of any major issues the party anticipates to raise in connection with the utility's application for a general rate change. Said list of anticipated major issues shall be updated, as necessary, up to five (5) days prior to filing responsive testimony."

between OG&E and Trigen in the marketplace. Furthermore, the Commission lacks jurisdiction to adjudicate a private matter between OG&E and Trigen; the Commission's jurisdiction is expressly limited under Oklahoma law, and private disputes must be litigated in the district courts.

ARGUMENT

Proposition 1: The Commission lacks jurisdiction to adjudicate issues involving private rights.

The Corporation Commission is a constitutionally created agency possessing legislative, executive and judicial powers,[4] but the Commission possesses only such power and authority as has been granted to it by the Constitution and Statutes.[5] The jurisdiction and authority of the Commission is limited to that which has been expressly or by necessary implication conferred upon it by the Constitution.[6] It is well settled in Oklahoma law that the Commission has no power or authority to settle disputes of a private nature. In *Smith et al. v. Corporation Commission et al.*, 101 Okl. 254, 225 P. 708 (1924) the Oklahoma Supreme Court reversed a decision of the Commission awarding attorneys' fees in a case against Oklahoma Gas and Electric Company brought by certain customers for the failure of the Company to maintain adequate natural gas pipeline pressure to serve the customers. In defining the power and authority of the Commission, the Court held at page 256:

---

[4] See *Continental Tel. Co. of Oklahoma v. Hunter*, 590 P.2d 667, 668 (Okl. 1979).

[5] Id.

[6] *St. Louis-San Francisco Ry. Co. v. State*, 268 P.2d 845 (Okl. 1954).

> It has jurisdiction to supervise, regulate, and control public utilities, in so far as their public duties are concerned, and to establish rates to be charged by them for a public service, and if rates in excess of those established are collected, it has the authority to adjust controversies between the utility and the consumer by determining the amount of refund due the consumer, and to whom the same should be paid, and it may enforce the payment of such overcharge in the same manner that fines and penalties imposed by it are authorized to be collected by law, and when such overcharge is collected, it shall be by the commission paid to the parties to whom it is due. Its jurisdiction is limited to those controversies wherein the rights of a public utility and the patrons thereof are involved. **It has no power or jurisdiction to adjudicate differences between private litigants or purely private matters between a utility and a citizen.** (Emphasis added).

The Court went on to state that the Commission has no power to fix or decree a lien upon the funds in its hands belonging to the patrons or to fix the amount of an attorney's fee that should be paid by either the consumer or the utility or to determine controversies between attorney and client.

In *Chicago, R.I.&P. Ry. Co. v. State et al.,* 158 Okl. 57, 12 P.2d 494 (1932), the Court quoted the above language from the *Smith* case and at pages 59-60 went on to state:

> In the above decision this court held that the Corporation Commission had jurisdiction as to all matters where the public and the utility were involved, **but that the Corporation Commission had no power or jurisdiction to adjudicate differences which are purely private between a utility and a citizen.** The line of demarcation being that so long as the matter in

> controversy is one that affects the public, then the Corporation Commission would have jurisdiction to consider the same, **but where said matter in controversy is a private matter merely between the company and the individual then the same becomes a private matter between the corporation and the individual and not a public concern and not being of public concern, the Corporation Commission does not acquire jurisdiction thereof.** (Emphasis added).

In *Central States Power & Light Corp. v. Thompson et al.*, 177 Okl. 310, 58 P.2d 868 (1936), Thompson brought an action in the District Court alleging the defendant utility had sold natural gas to Thompson's cleaning and pressing plant under the utility's residential tariff instead of its industrial tariff and seeking a refund of overpayments to the utility for a period of three years. The utility asserted *inter alia* that since its tariffs were fixed by the Oklahoma Corporation Commission, the Commission had exclusive jurisdiction over the cause of action. On appeal, the Court followed its decision in the *Smith* and *Chicago, R.I.&P.* case, quoting at length from the latter case, and finding that the District Court had both personal and subject-matter jurisdiction.

The Court has consistently applied the private action standard of the Smith Case to hold that the Commission has no jurisdiction to litigate private disputes in the absence of specific statutory authority to the contrary.[7] Thus, in 1939, the Court determined that the *Smith* line of cases did not apply where the Commission had been granted legislative authority to settle disputes arising between lessees of oil and gas drilling and spacing units.[8] Similarly, the Commission has exclusive jurisdiction by virtue of its statutory authority

---

[7] See *Russell v. Walker et al.*, 160 Okl. 145, 15 P.2d 114.

[8] *Croxton et al. v. State et al.*, 186 Okl. 249, 97 P.2d 11.

to determine refunds where a public utility charges its patrons in excess of the lawful rate in force at the time a charge is made or which should have been applied to the service rendered in the absence of an approved contract or tariff.[9] Conversely, in *Southwestern Light & Power Co. v. City of Elk City,* 188 Okl. 540, 111 P.2d 820 (1941), the Court held that "(w)hile the Corporation Commission has complete authority and jurisdiction in rate-making cases to fix utility rates, and in proper cases may order refund of excessive rate collections over the legal rate, there is no authority to construe contractual rights . . . ."[10]

In *Gibson v. Elmore City Telephone Company,* 411 P.2d 551 (Okl. 1966), the District Court dismissed a case involving a dispute over the division of toll revenues collected for the transmission of messages over the lines of both utilities for lack of subject matter jurisdiction. The Supreme Court reversed and remanded to the District Court holding that the litigation involved solely a dispute between two private concerns over the division of toll charges. At page 553 the Court said:

> It is not contended that the rates charged were in excess of the rates fixed by the Corporation Commission. The Corporation Commission **has no jurisdiction over a controversy between two private concerns.** Such controversy can be adjusted only in a suit between the parties in a court of competent jurisdiction. (Emphasis added).

Cases determining that the Commission has no jurisdiction

---

[9] *State ex rel. Hales v. Public Service Co. et al.,* 187 Okl. 182, 102 P.2d 139 (1940).

[10] 188 Okl. at 541-542. See also, *St.Louis-San Francisco Ry. Co. v. State, supra, at footnote 6.*

to determine a private right of action are not limited to contract or property law. The Court has also held that the Commission has no jurisdiction to try an action for damages[11] or for tortious or negligent conduct.[12] Neither does the Commission have jurisdiction to enforce a private cause of action granted by statute.[13] Since the Commission is not a court of general jurisdiction, it has no authority to enter a money judgment against any party.[14] Where a matter is a private concern between a public utility and one of its patrons, the courts and not the Commission have jurisdiction to determine the controversy.[15]

In this proceeding, Trigen attempted to have this Commission address issues currently pending before the United States District Court between Trigen and OG&E. Subsequently, that attempt was withdrawn on the record by counsel for Trigen.[16] Notwithstanding the withdrawal of those issues by Trigen, Trigen continues to advocate that the Commission should somehow prohibit anticompetitive behavior *in futuro*. Based upon the Commission's

---

[11] *Kingwood Oil Company v. Hall-Jones Oil Corporation,* 396 P.2d 510 (Okl. 1964); *Merritt v. Corporation Commission,* 438 P.2d 495 (Okl. 1968).

[12] *Continental Tel. Co. of Oklahoma v. Hunter,* 590 P2d 667 (Okl. 1979).

[13] See *Burmah Oil & Gas Company v. Corporation Commission,* 541 P.2d 834 (Okl. 1975) where the Court granted a writ of prohibition enjoining the Commission from issuing an order requiring Burmah Oil & Gas Co. to furnish a landowner gas service pursuant to statute.

[14] *Fent v. Oklahoma Natural Gas Co.,* 804 P.2d 1146 (Okl. App. 1990); *Lear Petroleum Corp. v. Seneca Oil Co.,* 590 P2d 670 (Okl. 1979).

[15] See *Gibson, supra,* at page 554; see also *Thompson, supra.*

[16] Application of Oklahoma Gas and Electric Company, Cause No. PUD 960000116, Transcript of Proceedings, January 6, 1997, pgs 13, 14.

constitutional and statutory authority as construed by the Supreme Court, the Commission is without jurisdiction to determine or adjudicate the private dispute between Trigen and OG&E now pending in the federal District Court, and the Commission is equally without jurisdiction to entertain allegations of anticompetitive practices which might occur now or in the future.

While there are no reported cases in Oklahoma involving a private dispute based upon antitrust law principles, the Ohio Supreme Court was presented with a persuasive case in 1982 where anticompetitive practices were alleged at the Ohio Public Service Commission against a telephone company. In *ARMCO, Inc. v. P.U.C. of Ohio, et al.*, 23 O.O.3d 361, 433 N.E.2d 923, Ohio Bell Telephone Company sought and the P.U.C. permitted the company to implement flexible rate tariffs. The Privately Owned Telephone Suppliers Association appealed contending *inter alia* that the P.U.C. "erred in refusing to consider the anticompetitive intent and effect of the . . . tariffs."[17] **The Ohio Supreme Court concluded that it is not the function of the P.U.C. to administer antitrust laws, "but rather to fulfill its statutory duty, to protect utility customers from unjustly discriminatory rates . . . "The Court found that the Ohio Commission "is without jurisdiction to entertain allegations of anticompetitive practices** unless the statutory conditions precedent, 'free service or service for less than actual cost' obtain."[18]

Proposition 2: **Trigen lacks standing to assert a private claim against OG&E in this proceeding.**

---

[17] 433 N.E.2d at 929-930.

[18] Id.

Trigen was granted intervenor status as a member of a customer of OG&E, and in that capacity Trigen has standing to inquire with respect to the effect which OG&E's proposed rates, charges, and terms and conditions will have on Trigen as a member of the class. Trigen does not have standing, however, to assert a private claim or dispute it may allege to have against OG&E; neither does it have standing to assert the possibility that OG&E's rates, charges, or terms and conditions of service might be administered by the Company in a manner which Trigen asserts would be anticompetitive.

Public utility law does not recognize nor does it grant standing to competitors to complain about the indirect effects of utility rates on their business. In *Pennsylvania Petroleum Association v. Pennsylvania Power & Light Company,* 412 A.2d 522, 524 (Pa. 1980), the Court stated as follows:

> "A customer claiming that a utility rate is in excess of what will give a fair return may seek to have it lowered. The seller of a competing product cannot force the utility to raise rates that it alleges are detrimental to its competitive position, as protection of such an interest is not an objective of the regulatory scheme." Citation omitted.

See also, *Crown American Corporation v. Pennsylvania Public Utility Commission,* 463 A.2d 1257, 1260 (Pa. Cmwlth. 1983). ("Crown's argument is untenable as a basis for the rejection of Rule 5F. Any economic disadvantage which may be the result of the Rule is not unreasonable, because the protection of Crown's economic interests and competitive position, and of those similarly situated, is neither an objective of Section 1502, nor of the regulatory schedule of the [Public Utility] Code in general. See, *Pennsylvania Petroleum Association v. Pennsylvania Power & Light Company,* 488 Pa. 308, 412 A.2d 522 (1980)."

CONCLUSION

By its own admission as justification for its intervention (found in first paragraph of this Introduction) Trigen has no standing to assert actual or possible private causes of action against OG&E in this proceeding. By law, the Commission has no jurisdiction to entertain allegations of a private nature in the context of a proceeding to determine the prospective rates of a regulated utility. Therefore, Trigen should be prohibited from raising any issues in the form of cross-examination questions herein which go beyond its standing to address the effect which OG&E's proposed rates, charges, and terms and conditions of service would have on Trigen **as a member of a customer class of OG&E**.

Respectfully submitted,
Oklahoma Gas and Electric Company

By /s/ Robert D. Stewart, Jr.
Robert D. Stewart, Jr., OBA #8628
321 N. Robinson
Oklahoma City, Oklahoma 73102
(405) 553-3658

and

H.D. Binns, Jr., OBA #799
Rainey, Ross, Rice & Binns
735 First National Center West
120 N. Robinson
(405) 235-1356